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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DOUBLE H PLASTICS, INC.,

Petitioner,

—v.—

SONOCO PRODUCTS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT At No. 83-1111

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98 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has the Third Circuit established "an impossible evidentiary standard" (Gibbons, J. dissenting) with respect to proof of a primary line violation of Section 2(a) of the Robinson-Patman Act, in direct conflict with applicable decisions of this Court, and in direct conflict with the U.S. Court of Appeals for the Second Circuit, because the Third Circuit "disagrees with the economic decision made by Congress in applying Section 2(a) to primary line competition" (*id.*)?

2. Has the Third Circuit engaged in "appellate factfinding" (Gibbons, J. dissenting) in contravention of Rule 52(a) of the Federal Rules of Civil Procedure and applicable decisions of this Court, in reversing a District Court intent finding and in reversing its own First Opinion in this case?

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OPINIONS OF THE COURTS BELOW

The United States District Court for the Eastern District of Pennsylvania on January 21, 1983, found that plaintiff Double H Plastics, Inc. had established that defendant Sonoco Products Company violated Section 2(a) of the Robinson-Patman Act and thereby injured competition, but went on to rule that neither monetary damages nor injunctive relief could be awarded, and entered judgment for defendant Sonoco. 575 F. Supp. 389 (E.D. Pa. 1983).

The United States Court of Appeals for the Third Circuit on November 29, 1983, Chief Judge Seitz dissenting, held that the District Court had correctly found that Sonoco violated Section 2(a) of the Robinson-Patman Act, but had erred in denying Double H monetary damages and injunctive relief, and entered judgment for Double H. The First Opinion was originally reported at 45 Antitrust & Trade Reg. Rep. (BNA) No. 1143 at 932, 954; [1983-2] Trade Cas. (CCH) ¶ 65,730 at 69,728.

The United States Court of Appeals for the Third Circuit on April 20, 1984, Judge Gibbons dissenting, reversed its First Opinion and held on panel rehearing that the District Court had erred in finding a violation of the Robinson-Patman Act, and entered judgment for Sonoco. 732 F.2d 351 (3d Cir. 1984).

JURISDICTION

The Second Opinion of the United States Court of Appeals for the Third Circuit, of which review by writ of certiorari is sought, was entered on April 20, 1984. A petition for rehearing was timely filed by petitioner Double H on May 3, 1984, and was denied by the Third Circuit on May 21, 1984. Pursuant to Rule 20.4 of this Court and 28 U.S.C. Section 2101(c), this petition is timely filed within 90 days of the denial of rehearing. Jurisdiction to review the judgment of the United States Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. Section 1254(1).

STATUTES

1. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimina-

tion are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

2. Rule 52(a), Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

I. Procedural History

This action was brought in the United States District Court for the Eastern District of Pennsylvania by plaintiff Double H Plastics, Inc. ("Double H") against defendant Sonoco Products Company ("Sonoco"), alleging violations of the federal antitrust laws, including Section 2(a) of the Robinson-Patman Act which prohibits price discrimination. Jurisdiction was conferred on the District Court by 28 U.S.C. Sections 1331 and 1337. The case was tried before the District Court sitting without a jury. After trial, the District Court entered an Opinion ruling that Double H had proved that defendant Sonoco violated the Robinson-Patman Act by engaging in price discrimination with predatory intent which caused injury to competition. The District Court found that Double H had

established every element of Sonoco's liability under the Robinson-Patman Act, including injury to competition, and that Sonoco had failed to prove an affirmative defense to such liability. But, despite having found that Double H's chief competitor was and for years had been engaged in a violation of federal antitrust law, the District Court went on to rule that neither monetary damages nor even injunctive relief to restrain Sonoco's continuing violation of the law could be awarded. Double H filed a timely appeal in the United States Court of Appeals for the Third Circuit.

On November 29, 1983, following full appellate briefing and oral argument, a Third Circuit panel filed its sixteen-page Opinion in this action (the "First Opinion") in which it awarded Double H treble damages of $450,000, injunctive relief, and statutory attorneys' fees based on its determination, set forth in the First Opinion, that the District Court's denial of relief was the result of legal and factual error. The Third Circuit's award was founded upon the violation of the federal antitrust laws (specifically Section 2(a) of the Robinson-Patman Act) committed by defendant Sonoco. On the important issue of Sonoco's subjective intent (from which competitive injury was inferred), which the District Court sitting without a jury had found to be anticompetitive, the Third Circuit held that the "exhibits and other evidence" in the record "certainly tend to support [the] conclusion" reached by the District Court as to Sonoco's unlawful intent. First Op. at 6a.[1] Judge Gibbons and Judge Rosenn joined in that majority First Opinion, with Chief Judge Seitz dissenting.

On December 12, 1983, Sonoco, citing no new superseding cases and advancing no new arguments on the intent issue, filed a petition for rehearing. On January 9, 1984, the parties were advised that a member of the panel majority had requested panel rehearing, without elaboration of any reasons therefor. Double H's subsequent request for additional argument or briefing with respect to whatever unknown issue had prompted this development was denied.

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1 Citations to pages of the opinions of the courts below refer to the appendix to this Petition.

On April 20, 1984, the Third Circuit issued a new Opinion (the "Second Opinion") which, without any reference whatsoever to the First Opinion, completely reversed the result reached in the First Opinion. Judge Rosenn, apparently having changed his mind, now joined with Chief Judge Seitz in what had previously been the dissenting opinion, holding in the Second Opinion that the District Court's intent finding on the liability issue would be reversed because of the new majority's "definite and firm conviction" that the intent finding was clearly erroneous. No explanation was offered as to what possibly could have enabled Judge Rosenn to reach such a "definite and firm conviction" with respect to the same issue on which his Honor reached the opposite result based on the same record in the First Opinion. Judgment was entered for Sonoco.

Judge Gibbons vigorously dissented, stating that the reversal of the District Court's specific finding of intent was "a blatant example of the appellate factfinding which Rule 52 prohibits . . . . The plain fact is that the majority disagrees with the economic decision made by Congress in applying Section 2(a) to primary line competition and is determined to establish an impossible evidentiary standard." Second Op. Dissent at 35a.

This Petition filed by Double H will demonstrate the accuracy of Judge Gibbons' view, expressed in his Second Opinion dissent, that "the plain fact" which emerges is that the Third Circuit is refusing to enforce a law enacted by Congress, the Robinson-Patman Act, because it disagrees with it. Second Op. Dissent at 35a. This Petition will further set forth the reasons why the District Court's, and the First Opinion's, finding of competitive injury (to which the finding of intent relates) was *mandated* by applicable Supreme Court decisions, and the reasons why the "impossible" evidentiary standard imposed by the Third Circuit fails to comport with those decisions and is also in direct conflict with the law of the Second Circuit. Finally, this Petition will show that the Second Opinion's reversal of a District Judge's intent finding far exceeds the Supreme Court's established parameters of permissible appellate review.

II. Statement of Underlying Facts

Double H, a small family business, and Sonoco, a large conglomerate, are manufacturers of business machine cores, which are small cylinders around which paper is wrapped to make finished paper rolls for use in adding machines or cash registers. Business machine cores encompass two product lines: adding machine cores and cash register cores, which are similar products differing only in size. The cores can be made of either plastic, or fiber (also referred to as cardboard or paper). Sonoco historically manufactured only fiber cores, but began to manufacture plastic cores after Double H, the plastic core pioneer, made substantial inroads into the adding machine core product line with its plastic product.

Despite its success in marketing plastic adding machine cores (resulting in lower prices for consumers) and despite the close similarity of adding machine and cash register cores, Double H has not been able to penetrate the cash register core line which remains inertly entrenched in Sonoco's fiber product. The District Court, and the Third Circuit in the First Opinion, found that the reason for this peculiar situation is that Sonoco has illegally frozen the entire cash register core market in the more expensive fiber cores by discriminating in price in its sales of fiber cores to NCR Corporation ("NCR"), formerly National Cash Register Company, the largest single buyer of cash register cores in the market.

The District Court, and both Opinions of the Third Circuit, found that NCR is the industry "trendsetter" in the cash register core segment and that Sonoco was aware that small purchasers of cash register cores are unwilling to switch to plastic until NCR makes the change. Thus, even though Double H's equally functional plastic core is *much less expensive* than Sonoco's list prices on fiber cash register cores for every buyer except NCR, these buyers are impelled to keep buying Sonoco's more expensive fiber cores as long as NCR remains a fiber core customer. NCR testified that "economics" will dictate whether or not it will switch to plastic. The "economics" which Sonoco has designed for the marketplace are that

Sonoco's discriminatory price to NCR, while still somewhat higher than Double H's plastic core price, is kept low enough to prevent NCR, and thus the entire industry, from switching from Sonoco's fiber cores to Double H's less expensive and equally good or better plastic product.

The Third Circuit's Second Opinion concedes that "the defendant sells its paper [*i.e.*, fiber] cash register cores at two prices, charging a lower price to NCR and a higher price to its other cash register customers." Second Op. at 24a. The Second Opinion concedes that "NCR's refusal to switch to plastic is a problem for the plaintiff, because NCR is regarded as an industry leader. Many of the smaller buyers of cash register cores have refused to switch to plastic until NCR does so, and the plaintiff is therefore unable to make sales to a large segment of the cash register market." Second Op. at 24a. The Second Opinion also concedes that the defendant was fully aware of the foregoing. Second Op. at 27a.

Somehow, the Third Circuit has nonetheless reversed a District Court finding of fact that there is "competitive injury" from price discrimination (which this Court has broadly defined as a "reasonable possibility that a price difference may harm competition")[2] despite the facts that (i) an antitrust plaintiff has been foreclosed from an entire product line by a defendant's long-term and substantial price discrimination, (ii) the plaintiff is offering an at least equally good and cheaper substitute product, (iii) as a result of the defendant's price discrimination, buyers other than NCR wind up paying grossly inflated prices (40% higher than Double H's price for its plastic product) to the defendant for fiber cash register cores, and (iv) the District Court found that the defendant engaged in this price discrimination with predatory intent. The Third Circuit's Second Opinion ruling that there has been no violation of law in these circumstances renders meaningless the federal prohibition in Section 2(a) of the Robinson-Patman Act against price discrimination.

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2 *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 103 S. Ct. 1282, 1288 (1983), discussed at pp. 10-11, *infra*.

As Judge Gibbons stated in dissent in the Second Opinion:

> There is in this record virtually no evidence of any other purpose in giving a price discrimination to NCR than Sonoco's desire to continue to exclude Double H's product from the entire cash register market. If evidence of an intention to preclude Double H's product from an entire product market is not evidence of predatory intent, what evidence would satisfy the majority? Second Op. Dissent at 35a.

And, of course, in the First Opinion Judge Gibbons *and Judge Rosenn held that*

> Given the uncontradicted evidence that there was no technical reason why NCR did not switch to plastic, the suggestion that price discrimination foreclosed Double H from the cash register core market is anything but speculative. Indeed on the record before us *no other inference is permissible*, for there is no other evidence of any reason for Double H's lack of success. (emphasis added) First Op. at 11a.

Despite the certainty and clarity of this overwhelming showing of injury, the Third Circuit's Second Opinion has denied Double H the judgment which it won in the First Opinion. This denial flies in the face of applicable decisions of this Court which liberally define the appropriate standard for determining the existence of "competitive injury" for purposes of Robinson-Patman Act liability. Moreover, the very nature of the Third Circuit's uncertain about-face on the District Court's competitive injury finding *precludes* the assertion that this finding could somehow become "*clearly* erroneous" on the same record on which it was previously held by the Third Circuit to be "certainly" supported. Such an unexplained turnabout lends substantial credence to Judge Gibbons' assertion in dissent that the "plain fact" which emerges is that the Third Circuit is simply refusing to enforce a federal law because it disagrees with the decision made by Congress in enacting it. This assertion of "judicial legislation," leveled not by a litigant but by a respected Circuit Judge, independently warrants the scrutiny of this Court by writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT HAS CONTRAVENED THIS COURT'S LIBERAL DEFINITION OF THE "COMPETITIVE INJURY" ELEMENT OF ROBINSON-PATMAN ACT LIABILITY

As noted above, in His Honor's dissent in the Second Opinion, Judge Gibbons states:

> The plain fact is that the majority disagrees with the economic decision made by Congress in applying Section 2(a) to primary line competition, *and is determined to establish an impossible evidentiary standard.* (emphasis added) Second Op. Dissent at 35a.

The Third Circuit's establishment of even a rigorous evidentiary standard for finding competitive injury in a Robinson-Patman Act case (to say nothing of an "impossible" one) is directly contrary to this Court's most recent definition of the competitive injury element. In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 103 S. Ct. 1282, 1288 (1983), this Court expressly held that all that a plaintiff must show to meet the "competitive injury" requirement of Section 2(a) is "a reasonable possibility that a price difference may harm competition," and further held that "§ 2(a) does not require that the discrimination must in fact have harmed competition." *Falls City*, 103 S. Ct. at 1288. Moreover, this Court in *Falls City* reaffirmed the rule established in *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948), that "for the purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time." *Falls City*, 103 S. Ct. at 1289 citing *Morton Salt*, 334 U.S. at 46, 50-51 ("It would greatly handicap effective enforcement of the [Robinson-Patman] Act to require testimony to show [injury] which we believe to be self-evident"). In the instant

case, the existence of Sonoco's price discrimination, the *substantial* price difference (12%–18%) in the price it charged NCR compared to other customers, and the duration over time of the discrimination (at least six years) was *documented and undisputed*. However, the Third Circuit held in the Second Opinion that there was no prima facie showing of competitive injury, and reversed the District Court's finding thereof, notwithstanding the clear import of *Falls City* and *Morton Salt*.

As Judge Gibbons noted, the Third Circuit is clearly opposed to extending a broad definition of competitive injury to primary line Robinson-Patman Act cases. However, the *Falls City* Court expressly *rejected* the suggestion that it confine the applicability of this so-called "self-evident inference" of competitive injury to any particular species of Robinson-Patman Act cases, holding that

> the [Robinson-Patman] Act "is of general applicability and prohibits discriminations generally," *FTC v. Sun Oil Co.*, 371 U.S 505, 522 (1963). *The determination whether to alter the scope of the Act must be made by Congress, not this Court* . . . . 103 S. Ct. at 1289 (emphasis added).

This Court's "reasonable possibility of harm" and "self-evident" injury standards set forth in *Falls City* are plainly lenient, liberal and prophylactic ones which the Third Circuit has ignored. Indeed, in reversing the finding of "competitive injury" in this case despite Double H's clear showing of competitive foreclosure, the Second Opinion makes no reference whatsoever to this Court's broad and liberal definition of "competitive injury," and instead applies a plainly restrictive evidentiary test which Judge Gibbons describes as "impossible" to satisfy. Second Op. Dissent at 35a. This failure to adhere to controlling Supreme Court precedent, and the resulting conflict between the standard applied by the Third Circuit in primary line Robinson-Patman Act cases versus the liberal standards which this Court has held have "general applicability" in all Robinson-Patman Act cases nationwide, requires review by this Court.

It is noteworthy that the Third Circuit, in its only significant prior holding in a primary line Robinson-Patman Act case, reversed a jury verdict in favor of an antitrust plaintiff, but purported nonetheless to affirm the viability in the Circuit of a cause of action under Section 2(a) of the Robinson-Patman Act, provided the plaintiff can establish competitive harm either through market analysis or proof of predatory intent. *O. Hommel v. Ferro Corporation*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). However, the "*O. Hommel* test" makes *no* reference to the Supreme Court's liberal definition of competitive injury; and although Double H met both prongs of the purported *O. Hommel* test in the instant case, the Third Circuit still refused to find a violation and reversed the District Court's explicit finding of competitive injury, including its predatory *intent* finding. A brief review of this case makes it apparent that the "*O. Hommel* test" is being built by the Third Circuit into what Judge Gibbons describes as an "impossible" barrier to antitrust plaintiffs, in contravention of this Court's decisions.

In this regard, the record in this case shows, and the Second Opinion *concedes*, that an entire product line—cash register cores—has remained locked into Sonoco's more expensive fiber product due to Sonoco's long-term, substantial price discrimination with the industry trend-setter, despite the availability of Double H's much more price-competitive plastic product. This foreclosure injures not only Double H, but competition on the merits generally with the sole beneficiary being Sonoco. The existence of the supra-normal prices paid by the smaller customers for fiber cash register cores, coupled with the almost complete exclusion[3] of the less expensive plastic product from the cash register core line due to Sonoco's price discrimination, clearly would be sufficient proof of competitive harm by market analysis if the *O. Hommel* test

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3 Although neither appellate opinion refers to this finding, the District Court did weigh Sonoco's proof that one or two customers had switched to plastic, and still *found* "that the statements that one or two converters [customers] have switched to plastic cores is *insufficient to disprove competitive harm.*" Dist. Ct. Op. at 59a.

were being applied by the Third Circuit in a manner consistent with the Supreme Court standards discussed above.

Second, *O. Hommel* expressly allows the fact-finder to *infer* competitive harm if the trial court finds the existence of predatory intent. The District Court, as well as Judge Gibbons in both Opinions *and* Judge Rosenn in the First Opinion, deemed such a finding to be "certainly" warranted in this case based on the documentary and testimonial evidence. However, in the Second Opinion, the new Third Circuit majority has withdrawn this finding and Judge Gibbons avers that the panel has reversed itself, as well as the District Court, because two Circuit Judges disagree with the wisdom of Congress in enacting the underlying law. As a result, the *O. Hommel* test has been transformed, *de facto*, into what Judge Gibbons describes as an "impossible" evidentiary standard in conflict with this Court's directives, and the vitality of Section 2(a) of the Robinson-Patman Act has been thereby destroyed in primary line cases within the Third Circuit.

It is fundamental that the laws which Congress enacts must be uniformly enforced in the absence of Constitutional defects. The Robinson-Patman Act has been the law of the United States for forty-eight years and regardless of competing economic theories, it is one of the basic rules of the road which Congress says businesses are constrained to obey, and which delineate the way businesses properly may compete. As this Court has observed, the Act is of "general applicability" and Congress encourages victims of price discrimination to act as "private attorneys general" by providing stringent sanctions for violations. Those violators who take advantage of their law-abiding competitors by discriminating in price should not do so with impunity due to "judicial legislation." The unwillingness to enforce the Robinson-Patman Act attributed to the Second Opinion majority by Judge Gibbons renders a portion of the United States unconstrained by the law which governs the rest of the nation. Such a situation requires the corrective action of this Court.

II.

THE THIRD CIRCUIT'S DECISION IN THIS CASE IS IN DIRECT CONFLICT WITH THE LAW OF THE SECOND CIRCUIT

In keeping with the remedial and prophylactic purposes of the Robinson-Patman Act, as well as the "self-evident" inference rule of *Morton Salt, supra*, the United States Court of Appeals for the Second Circuit has consistently held in primary-line Robinson-Patman Act cases:

> In this circuit, proof of price discrimination satisfies a plaintiff's initial burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition. *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

See also Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

The Third Circuit's Second Opinion in the instant case is directly contrary to the foregoing decisions of the Second Circuit. As Judge Gibbons noted in his Second Opinion dissent, the Third Circuit has placed upon a Robinson-Patman Act *plaintiff* an "impossible" evidentiary burden with regard to proof of injury, which stands in stark conflict with the Second Circuit's holding that the burden of *negating* competitive injury lies with the *defendant* once price discrimination has been shown, as it was shown in the instant case.

This conflict between the circuits is of vast importance with regard to the protection afforded to businesses under the Robinson-Patman Act. In the instant case, Judge Gibbons noted (and Judge Rosenn in the First Opinion agreed) that there was in the record "virtually no evidence of any other purpose in giving a price discrimination to NCR than Sonoco's desire to continue to exclude Double H's product from the

entire cash register market." Second Op. Dissent at 35a. The District Court also specifically found Sonoco's showing "insufficient to disprove competitive harm." Dist. Ct. Op. at 59a. Clearly, under the law of the Second Circuit, Sonoco's failure to present any evidence negating adverse competitive effects from its years of documented, substantial price discrimination would have mandated a judgment for Double H.

The Second Circuit's rule regarding the burden of proving competitive harm is plainly in harmony with this Court's holding in *Morton Salt*, *supra*, that "it would greatly handicap effective enforcement of the Act" to require explicit proof of competitive injury which is "self-evident", and accordingly that proof of a substantial price discrimination over time suffices to establish such injury *prima facie*. 334 U.S. at 46, 50-51. In direct contrast, the Third Circuit's Second Opinion holds that "the discount [price difference] itself *cannot* support such an inference [of competitive injury] unless we are to reject the holding of *O. Hommel* . . . ." Second Op. at 28a-29a (emphasis added). In fact, what the Third Circuit did in the Second Opinion was reject *Morton Salt* and *Falls City*, thereby underscoring its clear conflict with the Second Circuit regarding the competitive injury aspect of Robinson-Patman Act liability. The *proper* result under this Court's holdings, as followed by the Second Circuit, is that proof of a substantial price discrimination over time *does* support, *prima facie*, the "self-evident" inference of competitive injury, which defendant must then negate—something which Sonoco wholly failed to do in this case. In light of the Third Circuit's rejection of this principle and the resulting conflict in the circuits, this Court should grant certiorari to resolve this significant question of federal law.

III.

THE THIRD CIRCUIT'S SECOND OPINION ENGAGES IN "APPELLATE FACTFINDING" IN VIOLATION OF FRCP 52(a) AND THE SUPREME COURT'S REPEATED ADMONITIONS THAT FINDINGS OF INTENT MUST BE ACCORDED SPECIAL DEFERENCE ON APPEAL

The District Court's finding that Sonoco's price discrimination has caused competitive harm was based in part on its finding that Sonoco had acted with predatory intent. Thus, the finding of intent was crucial, and it was this intent finding that was affirmed in the First Opinion and reversed in the Second Opinion.

It is basic that no finding of fact may be set aside unless it is "clearly erroneous," pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Even "serious doubts" on the part of an appellate judge with regard to the District Court's weighing of the evidence do *not* suffice, *Columbus Bd. of Educ. v. Penick*, 433 U.S. 449, 468 (1979) (Burger, C.J., concurring); there must exist the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). *Moreover, Rule 52(a) also requires that the appellate court must give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses."*

A long line of cases in this Court has consistently admonished the Courts of Appeals that factual findings of *intent* receive special deference on appeal, because "[f]indings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them" *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). This refrain has been sounded repeatedly by this Court, *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982), *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952); and this precise principle was the holding of the Third Circuit in *Hoots v. Pennsylvania*, 672 F.2d 1107,

1116-17 (3d Cir.), *cert. denied*, 103 S. Ct. 55 (1982), citing *Yellow Cab, supra.*

The Second Opinion in the instant case represents such a complete departure from Rule 52(a) and the foregoing *uniform* line of authority that Judge Gibbons described the majority's reversal of the District Court's pivotal intent finding (the same finding which the First Opinion had affirmed), as being "a blatant example of the appellate factfinding which Rule 52 prohibits." Second Op. Dissent at 35a. The Second Opinion performs an isolated review of one key memorandum, without *any* regard--much less the "due regard" required by Rule 52—for the fact that *Sonoco's product manager testified live in front of the factfinder about that very memorandum, which he authored, and tried, until confronted with his own words, to deny its plain contents*:

> Q. Okay. Here's my question, though: Have you ever agreed with the fact, with the statement, that until NCR switches to plastic cash cores—or until NCR switches to plastic cores the rest of the market is reluctant to switch?
>
> A. I have heard that statement.
>
> Q. I've asked you if you agree with it. Have you ever agreed with it?
>
> A. *If I ever have agreed with it? No, I have not.*
>
> Q. Okay. I'd like to refer you to Double H Exhibit 135.
>
> It says right in Double H Exhibit 135 the main account on Group I cores—those are cash register business machine cores, correct, Group I cores.
>
> A. I think so, yes.
>
> Q. (continuing)—is NCR, and they have elected to stay with the paper cores until the economics favor switching to plastics. The remainder of the marketplace is reluctant to switch until NCR makes the change.

Do you know who said that? You.

A. Then it must be true. (emphasis added) Joint Appendix at 534-535.

For an intent finding based in part on the contents of the above memorandum and testimony to be set aside by an appellate court without any *reference* to, much less "due regard" for, the accompanying live testimony—testimony as to which observation of witness demeanor and credibility by the factfinder was plainly vital—is a violation of Rule 52(a).[4]

Finally, and compounding every other compelling consideration noted above, the Third Circuit panel's determination to reverse the District Court's intent finding was reached on the basis of no new information after the same panel held in the First Opinion that the intent finding was "certainly" supported by the evidence. This plain circumstance contravenes the standard of appellate review set forth in Rule 52(a) and in *United States Gypsum* which dictates that no District Court finding of fact may be set aside unless *clearly* erroneous, requiring a "*definite and firm* conviction" that a mistake has been made. How can it be maintained that Judge Rosenn's silent and unexplained change of heart, meets that rigorous test?[5]

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4 Similarly, the Second Opinion is devoid of any reference to the live testimony before the District Judge of another Sonoco manager who on cross-examination displayed revealing discomfort even with admitting Sonoco's documented and consistent price discrimination with NCR [Joint App. at 557-58], and who was forced to admit (again reluctantly) the documented fact that Sonoco had made some substantial sales of fiber cores to NCR at discriminatory prices well below direct cost. [Joint App. at 566-72]. Rule 52 does not permit the District Court's finding regarding Sonoco's intent to be stripped of this testimonial context on appeal.

5 A few words should be said about the Second Opinion's reference to the "unappealed portion" of the District Court's decision. The District Court found that Sonoco had priced some of its fiber cores to NCR below cost, but concluded, principally on the basis of another *intent* finding, that Double H had not proved its Sherman Act claim. Double H *disagreed* with that Sherman Act intent finding, but solely because

Given the facts of this case wherein a Court of Appeals has reversed an *intent* finding which it first affirmed on the identical record, and given the lack of any even attempted explanation in the Second Opinion for this extraordinary step, the only possible conclusion is that Judge Gibbons has correctly identified the underlying cause of the Third Circuit's decision herein—the Court of Appeals disagrees with the law and is refusing to enforce it. The gravity of this situation, and the pressing need for the Supreme Court to grant review, is plain.

CONCLUSION

In order to restore nationwide uniformity to the enforceability of Section 2(a) of the Robinson-Patman Act, petitioner Double H respectfully urges that certiorari be granted.

Respectfully submitted,

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of the stringent Rule 52(a) prohibition against appellate fact-finding, particularly on issues of intent, did not appeal that claim. Thus it is particularly unfounded for the Second Opinion to overturn improperly the District Court's intent finding on the Robinson-Patman Act claim by reference to the "unappealed" Sherman Act intent finding, when it would have been equally "logical"—but equally impermissible under Rule 52—for an appellate court to overturn the Sherman Act intent finding (with which Double H disagreed) by reference to the Robinson-Patman Act intent finding, bolstered by plaintiff's strong (and largely unrebutted) showing that defendant did engage in below-cost pricing in violation of the Sherman Act.

APPENDIX

First Opinion of the United States Court of Appeals for the Third Circuit, filed November 29, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1111

DOUBLE H PLASTICS, INC.,

Appellant

v.

SONOCO PRODUCTS COMPANY

(D.C. Civil No. 82-1904)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: September 15, 1983

Before: SEITZ, *Chief Judge;* GIBBONS and ROSENN, *Circuit Judges*

(Opinion Filed: November 29, 1983)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Double H Plastics, Inc., a primary line competitor of Sonoco Products Co., appeals from a judgment in favor of Sonoco in Double H's action for damages and injunctive relief for Sonoco's violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982). The case was tried to the court. Double H contends that the court's finding of a violation of section 2(a) is not clearly erroneous, but that the finding that it suffered no injury to its business or property from that violation is clearly erroneous. Double H also contends that the court erred as a matter of law in denying injunctive relief. Sonoco defends the trial court's factfinding on injury and its decision to deny injunctive relief, but as an alternative ground for affirmance contends that the court's finding of a violation of section 2(a) is clearly erroneous. We conclude (1) that the court's finding of a section 2(a) violation is not clearly erroneous; (2) that the court's finding of absence of injury is clearly erroneous; and (3) that the court erred in denying injunctive relief.

I.

Double H manufactures plastic cores for rolls of paper tape used in adding machines and cash registers. Sonoco manufactures fiber cores used for the same purpose, and has since January of 1980 also made plastic cores. The business of manufacturing plastic cores has developed since 1974, when Harry Harp and his wife founded Double H. Plastic cores have advantages over fiber cores, of being light weight, dust free, and favorably priced. Between 1974 and 1980 Double H made substantial inroads in the market for adding machine cores, but was less successful in the cash register market.

In 1978 Sonoco attempted unsuccessfully to acquire Double H from Mr. Harp. When that effort failed it entered the business of making and selling plastic cores. With this development Sonoco became a competitor of Double H in the sale of plastic cores, while Double H remained a competitor of Sonoco in the sale both of plastic cores and of fiber cores which plastic frequently displaced. Other competitors in the core market included Vulcan Corporation (plastic), Southern Metals & Plastics (plastic) and Crescent Paper Tube Co. (fiber).

Double H's Robinson-Patman Act charge involves efforts by Sonoco to preserve National Cash Register Company (NCR) as a purchaser of fiber cores. NCR is the largest seller of cash registers. It elected to use fiber cores for most of its needs. There is evidence that Sonoco sold fiber cores to NCR at prices below its list prices and lower than the prices offered to other customers. There is evidence, as well, that NCR informed Sonoco that from a utility viewpoint plastic cores were an acceptable substitute (App. at 689-90). A Sonoco internal memorandum (Exhibit DH 129) dated February 25, 1980 notes about NCR:

In view of the price difference between paper and

> plastic, they plan to continue with paper cores. They also stated that economics will dictate the type core they will use. They have tested our plastic cores as well as Double H cores and found them to be satisfactory. The only real advantage they found in plastic was no paper dust and lighter in weight. Jim [Eggleston] commented further by saying these advantages are not enough to pay a premium price for. They plan to order some additional plastic cores where the prices are about the same as paper so they can do some further testing. Jim also pointed out from time to time they buy a small quantity of cores from Crescent so they can say they have two sources of supply. They continue to be very high on Sonoco and I am confident that we receive the majority of their volume. Sales for 1979 amounted to $650,000.

App. at 690. Another internal memorandum, Exhibit DH 135, dated June 10, 1980, notes, however:

> The main account on Group I [cash register] cores is N.C.R. and they have elected to stay with the paper cores until the economics favor switching to plastics. The remainder of the marketplace is reluctant to switch until NCR makes the change.

App. at 708. A third Sonoco internal memorandum, Exhibit DH 151, dated March 24, 1981, records that a Sonoco representative

> contacted Jim Eggleston of NCR who sez [sic] they have not moved to plastics and it remains a matter of economics. I did not want to say H & H had priced their core at paper prices and did not. Paper went up (cash reg.) 9. + % recently and we should be alert to plastic cash reg. core increases also. Jim said he certainly would contact us if anything changes.

App. at 878. The reference to H & H could be found to be either a reference to Mr. and Mrs. Harp, the owners of

Double H, or a shorthand reference to their company name.

Testimony of an NCR employee tends to confirm that economics was the crucial factor in keeping NCR from switching, in 1980-81, from fiber to plastic cores. Testimony by a Sonoco employee tends to confirm that Sonoco believed in those years that the rest of the cash register marketplace would be reluctant to switch to plastic cores unless NCR did so. App. at 534-35.

There is also evidence from which it could be found that Sonoco held over ninety per cent of NCR's core business, and that its only serious competitor for that business was Crescent, which did not manufacture plastic cores. Thus it could be found that preventing a switch from fiber to plastic would not significantly benefit Crescent but would harm Double H. At the same time there is evidence that after Sonoco went into the plastic core business it experienced what it considered to be severe price competition in plastic cores from Double H. Exhibit DH 135 records that "[p]ricing of this [plastic] product line continues to be a problem with our major competitor [Double "H"] holding down the market price."

The trial court began its analysis by noting that in order to establish a prima facie case of violation of section 2(a) of the Robinson-Patman Act a plaintiff must prove (1) discrimination among customers in prices charged for sales of goods of like grade and quality, (2) such sales in interstate commerce, and (3) that the effect of the discrimination may be substantially to reduce competition or tend to create a monopoly.[1] In this case there was no real issue about the fact of discrimination in the pricing of fiber cores sold to NCR,

---

1. The court relied, in outlining the elements of a prima facie case, on Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 119 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

or about such sales being in interstate commerce. The disputed issue, with respect to Double H's prima facie case was the sufficiency of its evidence on the third element, possible effect on competition. The court noted

> There are two basic means of meeting the competitive injury requirement: actual competitive injury shown by market analysis; (2) predatory intent from which competitive injury may be inferred.[2]

Noting that Double H offered no evidence on the effect of Sonoco's price discrimination in favor of NCR on market shares in the business machine core business generally, the court turned to the one remaining disputed issue, evidence of predatory intent, from which likelihood of injury to competition may be inferred.

The trial court found a predatory intent on Sonoco's part, in discriminating in the prices charged to NCR, from the fact that Sonoco intended to retain NCR as a fiber core customer for the cash register business in order to forestall an industry-wide switch to plastic cores.

The exhibits and other evidence referred to above, while perhaps not compelling a conclusion that Sonoco granted NCR price discrimination for the predatory purpose of preventing an industry-wide switch to plastic cores, certainly tend to support that conclusion. The court's conclusion as to Sonoco's intent in granting the price discrimination is a finding of fact, as to which Fed. R. Civ. P. 52 applies. The courts of appeals have recently been admonished that the task of determining from the evidence what intent motivated a given action is for the initial factfinder, not for the reviewing court.

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2. The court relied, for these alternative means of proving likelihood of injury to competition on O. Hommell Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

Pullman-Standard v. Swint, ——— U.S. ———, 102 S. Ct. 1781, 1788-92, 50 U.S.L.W. 4425, 4428-30 (1982). Given the deferential standard of review mandated by Rule 52 and the record evidence referred to above, we cannot say that the trial court erred in finding predatory intent. Such an intent permits an inference of competitive harm.[3] Thus we accept the trial court's legal conclusion that Double H made out a prima facie case of a section 2(a) violation.

Having concluded that Double H had established a prima facie case, the court turned to Sonoco's evidence in support of the affirmative defense, provided in section 2(b) of the Act, of a good faith effort to meet competition. 15 U.S.C. § 13(b) (1982). That evidence was directed toward convincing the trial court that the price discrimination was directed not against Double H, its competitor in the plastic core business, but against Crescent, its competitor in the fiber core business. It consisted of testimony that NCR's purchasing agent, James T. Eggleston, told a Sonoco employee at one point that Sonoco's prices for paper core were higher than Crescent's. The occasion of the conversation was a proposed 1980 Sonoco price increase, to which NCR reacted negatively. Sonoco Exhibit 332. When told of Crescent's lower prices, Sonoco, according to Sonoco Exhibit 347, rolled back its NCR prices to their prior levels. The trial court, however, noted:

> There is no evidence in the record that any Sonoco employee attempted to verify the existence of a

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3. O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). The *Hommel* case involved the so-called double inference issue: whether below cost pricing would support an inference of predatory intent, which would in turn support an inference of injury to competition. That issue is not presented here. The trial court relied on direct evidence of Sonoco's intention in granting price discrimination to NCR.

> Crescent lower price. Without a diligent attempt to verify the purported lower price by Crescent, Sonoco has not met the good faith standard set forth in *[FTC v.] Staley* [324 U.S. 746 (1945)]. All that is established by defendant's evidence is that NCR negotiated a lower price for itself by presenting to Sonoco personnel an approximation of a competitor's lower price. Sonoco relies on its fear of losing business to Crescent as evidence of its good faith. Documents obtained from Sonoco's files indicate that, at least in 1978, it believed it had no competition for NCR's business. (Plaintiff's Exhibit DH-19 at 100125). Sonoco has produced no evidence that it believed that by 1981 its competition had changed so that threats by NCR to give its business to Crescent could reasonably be believed to be true.

App. at 1994-95. Exhibit DH-19 to which the trial court refers is an internal Sonoco memorandum dealing with prospects for a number of products. It lists five customers for business machine cores, including NCR, and with respect to NCR lists "type of competition" as "None." There is deposition testimony by Eggleston that Crescent did sell "some high-volume items [to NCR] as well as low," but the court rejected it as "not sufficient to establish Sonoco's state of mind at the time it gave the discriminatory prices." There is also the reference in Exhibit DH 129, quoted above, to the fact that "Jim [Eggleston] also pointed out from time to time they buy a small quantity of cores from Crescent so they can say they have two sources of supply." The memo continues: "They continue to be very high on Sonoco and I am confident that we receive the majority of their volume." App. at 690.

The trial court concluded that Sonoco failed to meet its burden in proving that the unlawful price was given in a good-faith effort to meet competition. Sonoco urges that this conclusion is clearly erroneous. We do not

agree. There is evidence that Sonoco had over 90% of NCR's business, that it was confident of keeping that business, and that its concern was with competition from plastic cores, not from fiber cores manufactured by Crescent. Thus the record required the drawing of inferences as to Sonoco's good-faith in meeting competition. The record evidence might well have permitted the factfinder to draw a different inference than that which was drawn, but that task is foreclosed to us by Rule 52.

We conclude, therefore, that the trial court did not err in holding that Double H made out a prima facie case of a violation of section 2(a), which was not rebutted by Sonoco's attempt to establish the section 2(b) meeting competition defense.

II.

Having concluded that Double H had proved a violation of section 2(a) the court turned to the separate question whether the violation was one for which it could recover damages under section 4 of the Clayton Act. The court's method of analysis was correct, for the Supreme Court has noted:

> By its terms § 2(a) is a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition." (Emphasis supplied.) . . . Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to "[a]ny person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws. . . ." (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561-62 (1981).

This was a case involving primary line competition for sales to NCR, and the antitrust injury Double H attempted to prove was lost profits it would have made from sales to NCR. In support of that theory of injury Double H presented the testimony of its president, Mr. Harp. That testimony established that prior to 1980-81 Double H's plastic cash resister core was quality-tested and approved by NCR as fully functional. Harp also estimated that total annual sales of cash register cores by all competitors amounted to $1.5 million. Harp estimated that if price discrimination by Sonoco to NCR in 1980-81 had not discouraged an industry-wide shift to plastic, his company would have achieved a 50% market share in each year. Harp testified that Double H could anticipate 10% pretax profit on such additional sales. Thus, he estimated, Double H lost $75,000 in profits in each year that the price discrimination occurred.

The trial court rejected Double H's proof of injury, making four separate findings, each of which is clearly erroneous.

The trial court found that "[t]he plaintiff has not shown this court at what price it could have offered plastic cores so as to encourage NCR to make the switch to plastic." To the contrary, Double H exhibits DH 60 and 81 and Sonoco exhibits 111, 112 and 113, in evidence, establish Double H's prices for cash register cores, and a comparison of those exhibits with Sonoco prices shown on its price lists show that Double H's cash register core prices were lower. Compare exhibit DH 81 with exhibits DH 170, 171. To take one example, for a 2 5/16" cash register core, Double H's price of $8.12 per thousand is lower than Sonoco's discriminatory price to NCR of $9.59 per thousand, and much lower than Sonoco's $11.33 per thousand price charged to other customers. There is no evidence in the record impeaching these price differentials.

The trial court also found that "[t]here is no evidence that Double H would have sold plastic cash

register cores at prices that could compete with paper cash register cores." To the contrary, the exhibits referred to in the preceding paragraph establish that Double H's plastic core prices for cash register cores were in fact quite favorable when compared with Sonoco's prices to customers other than NCR. Moreover, the exhibits referred to in Part I above show that Sonoco's discriminatory prices to NCR were arrived at with knowledge that only economics prevented NCR from overcoming inertia and making a product switch.

The trial court found that "[i]t is mere speculation that, had Sonoco not sold at an unlawful price, Double H would have captured all of the volume of sales to NCR. It is even more speculative that Double H could then have captured the rest of the cash register core market." Here the court misstates the testimony. Mr. Harp did not contend that Double H would capture all of NCR's business or all of the cash register core market. He made an estimate that Double H had a potential market share of fifty percent. App. at 304-05. Since exhibits originating with Sonoco establish that Double H already held 80% of the unforeclosed market in 1980, and 70% in 1981, Harp's estimate is clearly conservative rather than speculative. *See* exhibit DH 106; Sonoco exhibit 238. Indeed Sonoco's post-trial proposed findings of fact concede Double H's success in the unforeclosed market. App. at 1750, 1859. The one market segment in which Double H was not successful was cash register cores, where NCR, the industry leader, received discriminatory prices. Given the uncontradicted evidence that there was no technical reason why NCR did not switch to plastic, the suggestion that price discrimination foreclosed Double H from the cash register core market is anything but speculative. Indeed on the record before us no other inference is permissible, for there is no other evidence of any reason for Double H's lack of success.

Finally the court found that Mr. Harp's projection of

a 10% profit on a $750,000 a year sale volume "is certainly without support." However Double H's financial statements for the year 1979, 1980 and 1981 are in evidence. Exhibits DH 168, 167, 160. They establish that Double H earned pretax profits in excess of 10% on sales for a large part of its business history. Indeed Sonoco's own projections of Double H's profitability, made in connection with its study of its possible acquisition, suggest profit margins on sales far in excess of those projected by Mr. Harp. Exhibit DH 19, at App. at 618. Sonoco attempts to defend the trial court's misinterpretation of the record by reference to a remark made by Mr. Harp during cross-examination about his 10% profit estimate:

> Q Mr. Harp, from time to time both in Answers to Interrogatories in this litigation and, indeed, in your testimony you've made reference to a 10 percent profit as a percentage of sales as a reasonable profit; is that right? Where did you get that number?
>
> A Well, I think I got it out of the air. It's a number that I consider a reasonable profit. I didn't generate it with any special thing. I take it as a number I would not like to operate under, and I'm not too unhappy if I'm not too far over it.
>
> Q Mr. Harp . . . Could you give the last part of that answer again.
>
> A I said I'm going to be unhappy if I go under the 10, and I'm not going to be unhappy if I go over it.

App. at 346-47. From this cross-examination Sonoco would have us conclude that Double H's estimate of lost profits is "certainly without support." To do so, however, we would have to disregard the Double H financial statements in evidence, and Sonoco's own

acquisition study in evidence. Moreover we would have to take Mr. Harp's testimony out of context. The meaning his words convey, plainly, is that for purposes of estimating additional sales he would be satisfied with pricing which would return a net pretax profit of ten percent. Indeed the surrounding questions in the sequence show the relationship between the desired mark-up and pricing. App. at 346-50. The entire sequence shows that Mr. Harp correctly understood that the thrust of the examination was not at whether he could make profits on sales but at whether he could price his product low enough to get the sales. The 10% estimate is quite responsive, for it indicates that although, as evidenced by its financial statements, Double H had been making more than a 10% mark-up it could price its products lower and still operate at a satisfactory level of profitability.

Section 4 Clayton Act plaintiffs who have established a violation of the antitrust laws are entitled to prove damages through "'probable and inferential, as well as direct and positive proof.'" *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931). Moreover the practical difficulties facing antitrust plaintiffs attempting to show what profits they would have made had sales not been foreclosed by illegal conduct has prompted the Supreme Court to observe:

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the

> evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Pictures, Inc., supra*, at 264.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-124 (1969). Moreover, in the context of a Robinson-Patman Act case the Court has explained the reason for its willingness to relax proof of injury standards which might otherwise apply.

> Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as Bigelow, that it does not "'come with very good grace'" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981).

The trial court's supported conclusion that unlawful price discriminations occurred places the case within the damage rules announced in the foregoing case. The trial court's conclusion that Double H's proof of injury is unsupported by evidence or speculative rests on findings of fact which are clearly erroneous. The evidence to which we have referred suffices to establish a prima facie case of injury to Double H's business in the form of lost profits in the amount of $150,000. Sonoco points to no record evidence impeaching that to which we have referred. Thus Double H's prima facie case of

injury to its business, unrebutted, requires the entry of a judgment in its favor for that amount, trebeled.

III.

Double H also seeks injunctive relief against continuance of the Robinson-Patman Act violation which the trial court found. Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), provides for such relief "against threatened loss or damage by a violation of the antitrust laws." Although the trial court's opinion is not entirely clear, it appears to hold that as a matter of law a plaintiff which cannot prove a sufficient injury to its business or property to obtain relief under section 4 of the Clayton Act cannot obtain a section 16 injunction. That analysis, if it was intended, is inconsistent with the plain language of section 16, and with the Supreme Court's most recent interpretation of it.

> In keeping with the Robinson-Patman Act's prophylactic purpose, § 2(a) "does not 'require that the discriminations must in fact have harmed competition.'" *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S. Ct. 1923, 1927, 68 L.Ed.2d 442 (1981), quoting *Corn Products*, 324 U.S., at 742, 65 S. Ct., at 969. This reasonable possibility of harm is often referred to as competitive injury. Unless rebutted by one of the Robinson-Patman Act's affirmative defenses, a showing of competitive injury as part of a prima facie case is sufficient to support injunctive relief, and to authorize further inquiry by the courts into whether the plaintiff is entitled to treble damages under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 15 (1976 ed., Supp. V).

Falls City Industries, Inc. v. Vanco Beverage, Inc., 103 S. Ct. 1282, 1288-89, 51 U.S.L.W. 4275 (1983). Thus the court's section 2(a) violation finding was itself a

sufficient predicate for injunctive relief, without any further inquiry into actual injury to the plaintiff's business or property. Moreover we have held in Part II that the trial court's rejection of Double H's unrebutted prima facie case of section 4 injury is clearly erroneous. Thus even under the trial court's analysis a reversal of the denial of injunctive relief is required.

IV.

The judgment appealed from will be reversed insofar as it dismissed Double H's claims for treble damages under section 4 of the Clayton Act and for injunctive relief under section 16 of the Clayton Act and will be remanded (1) for the entry of an appropriate award of damages, trebled, (2) for the framing of an appropriate injunction against price discriminations by Sonoco to NCR, and (3) for the determination of counsel fees.[4]

SEITZ, *Chief Judge*, dissenting:

I find myself in disagreement with the majority and the district court because I do not believe that the evidence offered by Double H reasonably permits a factfinder to conclude that Sonoco violated § 2(a) of the Robinson-Patman Act.

As this court has held elsewhere, and as the majority recognizes, "[p]rice discrimination is not illegal per se." *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 346 (3d Cir. 1981). In order to establish a violation of

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4. Because Double H has not pointed to any additional relief which would be available if the trial court had considered the merits of its pendent state law claim for damages for interference with prospective economic advantage, we have no reason to address that ground for appeal. Double H does not appeal from the dismissal of its Sherman Act claim.

§ 2(a), the plaintiff must show that the price discrimination either injured or threatened to injure competition. *Id.* The plaintiff may do this either by market analysis or by proof of predatory intent. *Id.* at 347. Double H has offered no market analysis and instead has relied on evidence of predatory intent. Predatory intent may be shown either by express evidence or by inference from below-cost pricing. *Id.* The district court concluded that Sonoco did not sell fiber cores to NCR at prices below cost, and Double H has not challenged that finding on appeal. Double H's case therefore turns on express evidence of predatory intent.

This court's decision in *O. Hommel* provides the starting point for analyzing Double H's evidence of predatory intent. There we explained that "[t]he legislative history of the Clayton Act indicates that predatory intent is an intent to destroy a rival with the ultimate purpose of acquiring a monopoly in a particular locality." *Id.* at 347. We therefore concluded that "express evidence of predatory intent should demonstrate the alleged predator's intention of sacrificing present revenues with the hope of obtaining monopoly profits." *Id.* at 348.

Before reviewing Double H's evidence of predatory intent to determine whether it satisfies the requirement of *O. Hommel*, it is important to note the standard by which my review must be conducted. "Intent" in this case is a question of fact, and a reviewing court must respect the lower court's findings of fact unless those findings are clearly erroneous. Fed.R.Civ.P. 52(a). This standard applies both to findings "that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v.*

United States Gypsum Co., 333 U.S. 364, 395 (1948).

The evidence that supports the district court's finding of predatory intent is set forth in the majority opinion and need not be repeated here. The district court believed, and the majority of this court agrees, that this evidence supports a finding of a violation because it establishes that Sonoco gave a discount to NCR in order to forestall the shift of the industry from paper to plastic cash register cores. Although the majority does not expressly relate this evidence to the test in *O. Hommel*, I presume that the majority finds it reasonable to infer that Sonoco's primary purpose in granting the discount to NCR was not to maximize gain in a legal fashion but to injure Double H by depriving it of important customers, with the ultimate aim of earning monopoly profits.

I believe the available evidence clearly establishes that Sonoco knew that NCR was an industry leader in the purchase of cash register cores, and that other manufacturers of cash registers would not switch from paper to plastic cores until NCR did so. The evidence, however, establishes no more than this. The internal Sonoco memorandum, dated June 10, 1980, on which the district court explicitly relied and which the majority quotes, states simply that (1) NCR is Sonoco's major paper core customer, (2) "economics" will determine whether NCR stays with paper cores or switches to plastic, and (3) other members of the market will not switch until NCR does so. There is nothing in this document that even vaguely suggests that Sonoco's primary purpose in offering the discount to NCR was to injure Double H. Instead, the document simply reveals that Sonoco was aware of the realities of its own marketplace, and evidence of such awareness, standing alone, cannot justify an inference of predatory intent.

There is no basis in any of these documents for inferring that Sonoco offered the discount to NCR for

reasons not within the bounds of sound and legal business judgment, nor is there any evidence that Sonoco could reasonably have believed that the retention of the cash register core business would either force Double H out of business or compel it to compete less vigorously. To the contrary, there is good reason to believe just the reverse. The district court, in the unchallenged portion of its opinion, concluded that Sonoco's sales to NCR were profitable and that Sonoco's pricing policies were the result of "stiff competition". *Double H Plastics, Inc. v. Sonoco Products Co.*, No. 82-1904, slip op. at 15 (E.D. Pa. Jan. 24, 2983). Sonoco's intent was simply "to increase sales volume", which is a normal business goal. *Id.* Noting the continued strong showing by Double H in the business core market generally, the district court concluded that "[t]he intent that can readily be inferred ... is that of competition with Double H rather than its elimination." *Id.* at 18.[1]

On the basis of this record, Double H has, in my view, failed the test set forth in *O. Hommel.* There is no evidence whatsoever to support the factual inference that Sonoco is sacrificing present revenues for the purpose of injuring Double H. The discount itself cannot support such an inference unless we are to reject the holding of *O. Hommel* and conclude that price discrimination is indeed a per se violation of the Robinson-Patman Act. Neither is there any evidence that Double H has been injured beyond the mere loss of the cash register customers. Double H is, and by all reckoning will remain, a strong competitor of Sonoco's

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1 The portions of the district court's opinion from which I have quoted deal with Double H's claims against Sonoco under § 2 of the Sherman Act, not § 2(a) of the Robinson-Patman Act. The quoted passages set forth the court's findings of fact, however, and are relevant here because the two claims against Sonoco rested on roughly the same set of facts.

for the sale of cash register cores. The mere failure to gain new customers in this market cannot entitle Double H to recover, else the free market system itself would be illegal.

On the entire record, I am left with the "definite and firm conviction that a mistake has been committed" on a critical issue of fact. I would therefore reverse the district court's finding of a violation of the Robinson-Patman Act and affirm the judgment against Double H.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

Second Opinion of the United States Court of Appeals for the Third Circuit, filed April 20, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1111

DOUBLE H PLASTICS, INC.

Appellant

v.

SONOCO PRODUCTS COMPANY

Appellee

Appeal from the United States
District Court for the
Eastern District of Pennsylvania

(D.C. Civ. No. 82-1904)

Argued: September 15, 1983

Resubmitted Before Original Panel
Pursuant to Third Circuit Rule 12(6)
January 9, 1984

Before: SEITZ, *Chief Judge*,
GIBBONS and ROSENN, *Circuit Judges*

(Opinion Filed: April 20, 1984)

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OPINION OF THE COURT

SEITZ, *Chief Judge:*

Plaintiff Double H Plastics, Inc., appeals from a final order of the district court entering judgment in favor of the defendant Sonoco Products Company on the plaintiff's claim under section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982). We have jurisdiction under 28 U.S.C. § 1291.

I.

The plaintiff and defendant are competitors in the business of producing and selling business machine cores, small spools that carry the paper used in adding

machines, cash registers, and other business machines. Slight differences in diameter distinguish the cores used in each type of machine. Traditionally the spools were made of paper, but since the mid-1970s various companies have made them of plastic. The new plastic cores have taken over the adding machine market, capturing 90% of the dollar volume of sales in 1980, but to date the cores have been less successful in the cash register market.

The plaintiff, through the knowledge and skill of its major shareholder Mr. Harry Harp, was a pioneer in producing and marketing plastic cores, and the company enjoyed great success in the late 1970s, eventually winning approximately 70% of the overall plastic core market. The other producers of plastic cores are the defendant, Vulcan Corporation, and Southern Metals & Plastics. Vulcan's percentage of the market has declined dramatically in the last few years, from 11.2% in 1980 to 2.2% in 1982, while Southern Metals & Plastics has experienced increasing success, going from 9.4% of the market in 1980 to 16.5% in 1982.[1]

The defendant, as the major producer of paper cores, has been a victim of the plaintiff's success in building the plastic core market. In 1978 the defendant contacted Mr. Harp and began negotiations to acquire the plaintiff company. These negotiations ended in 1979 when Mr. Harp rejected the defendant's offer. Thereafter the defendant acquired its own equipment and in 1980 began producing and selling plastic cores to compete in the adding machine market.

The defendant's major customer in the paper cash register core market is NCR Corp. For reasons that remain unclear, NCR has continued to buy paper cores

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1. The 1982 figures are based on the companies' performances during the first six months of that year.

from the defendant despite the fact that in recent years the plaintiff has offered to sell plastic cores at prices 11-12% lower than paper core prices. For example, in 1981 NCR purchased paper cores from the defendant at $9.59 per thousand, although the plaintiff was offering plastic cores at only $8.12. The evidence indicates that, economics aside, plastic cores are a suitable substitute for paper cores in cash registers.

The defendant sells its paper cash register cores at two prices, charging a lower price to NCR and a higher price to its other cash register customers. For example, in 1981 the defendant's price to NCR was $9.59 per thousand and $11.33 to other buyers. The defendant has admitted that the price difference is not cost-based.

NCR's refusal to switch to plastic is a problem for the plaintiff, because NCR is regarded as an industry leader. Many of the smaller buyers of cash register cores have refused to switch to plastic until NCR does so, and the plaintiff is therefore unable to make sales to a large segment of the cash register market. Despite this failure to invade the cash register core market, however, the plaintiff remains a successful company, making 65-70% of all plastic core sales in 1981 and 1982.

II.

In 1982 the plaintiff filed antitrust claims against the defendant under section 2 of the Sherman Act, 15 U.S.C. § 2 (1982), and section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982). The plaintiff based its Sherman Act claim on allegations that the defendant had sold both plastic and paper cores at predatory prices. The district court entered judgment in the defendant's favor on this claim, and the plaintiff has not appealed.

In its Robinson-Patman Act claim the plaintiff

alleged that the defendant had sold paper cash register cores to NCR at illegally discriminatory prices. The district court agreed that the defendant had violated the Act but nonetheless ruled in the defendant's favor on the grounds that the plaintiff had failed to establish "actual injury" and damages. The plaintiff appeals from the order entering judgment on this claim.

III.

The plaintiff argues that it produced sufficient evidence at trial to prove actual injury and damages under the Robinson-Patman Act. The defendant rejects this contention and argues in addition that we may affirm the district court's order on the ground that the court was in error in finding a violation of the Act in the first instance. We need only consider this last contention.

In order to prove a violation of section 2(a) of the Robinson-Patman Act, the plaintiff must satisfy the jurisdictional requirements (not at issue in this case) and then establish the existence of a price discrimination and an illegal effect on competition. von Kalinowski, 4 *Antitrust Laws and Trade Regulation* § 23.02 (1983).

The Supreme Court has ruled that any difference in price for the same product is a price discrimination. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960). As this court has previously recognized, however, "[p]rice discrimination is not illegal per se." *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 346 (3d Cir. 1981). In order to establish a violation of section 2(a), the plaintiff must show that the price discrimination either injured or threatened to injure competition. *Id.* The plaintiff may do this either by market analysis or by proof of predatory intent. *Id.* at 347. Here the plaintiff has offered no market analysis and instead has relied on evidence of predatory intent.

Predatory intent may be shown either by express evidence or by inference from below-cost pricing. *Id.* In the portion of its opinion considering the plaintiff's Sherman Act claim, the district court concluded that the defendant did not sell paper cores to NCR at prices below cost, and the plaintiff has not challenged that finding on appeal. The plaintiff's case therefore turns on express evidence of predatory intent.

In *O. Hommel* we explained that "[t]he legislative history of the Clayton Act indicates that predatory intent is an intent to destroy a rival with the ultimate purpose of acquiring a monopoly in a particular locality." *Id.* at 347. We therefore concluded that "express evidence of predatory intent should demonstrate the alleged predator's intention of sacrificing present revenues with the hope of obtaining monopoly profits." *Id.* at 348.

Before reviewing the plaintiff's evidence of predatory intent to determine whether it satisfies the requirement of *O. Hommel*, it is important to note the standard by which our review must be conducted. "Intent" in this case is a question of fact, and a reviewing court must respect the lower court's findings of fact unless those findings are clearly erroneous. Fed. R. Civ. P. 52(a). This standard applies both to findings "that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). A finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The district court based its finding of predatory intent primarily on one document, a Sonoco internal memorandum in which the defendant's general manager stated that "[t]he main account of [cash

register] cores is N.C.R. and they have elected to stay with the paper cores until the economics favor switching to plastics. The remainder of the marketplace is reluctant to switch until N.C.R. makes the change." From this document the district court concluded that "it was Sonoco's intent to retain NCR with the expectation that other paper converters would not convert to plastic until NCR did." *Double H Plastics, Inc. v. Sonoco Products Co.*, No. 82-1904, slip op. at 20-21 (E.D. Pa. Jan. 21, 1983). The district court also relied on the testimony of NCR officials that "economics [were] the crucial factor in keeping NCR from switching from paper to plastic cash cores. The testimony reveals that while other companies have occasionally attempted to sell plastic cores to NCR, they are unable to compete with Sonoco's prices." *Id.* at 21. On the basis of this evidence, the district court concluded that the plaintiff had established "predatory intent in Sonoco's effort to retain NCR as a paper cash core customer thereby forestalling the industry-wide switch from paper to plastic. From the finding of predatory intent we may infer injury to competition." *Id.*

We agree with the district court that the evidence clearly establishes the defendant's awareness that NCR was an industry leader in the purchase of cash register cores and that other manufacturers of cash registers would not switch form paper to plastic cores until NCR did so. The evidence, however, establishes no more than this. The internal memorandum on which the district court relied states simply that (1) NCR is the defendant's major paper core customer, (2) "economics" will determine whether NCR stays with paper cores or switches to plastic, and (3) other members of the market will not switch until NCR does so. There is nothing in this document that suggests that the defendant's primary purpose in offering the

discount to NCR was to injure the plaintiff. Instead, the document simply reveals that the defendant was aware of the realities of its own marketplace, and evidence of such awareness, standing alone, cannot support an inference of predatory intent.

There is no basis in any of the documents or testimony for inferring that the defendant offered the discount to NCR for reasons not within the bounds of sound and legal business judgment, nor is there any evidence that the defendant could reasonably have believed that the retention of the cash register core business would either force the plaintiff out of business or compel it to compete less vigorously. To the contrary, there is reason to believe just the reverse. The district court, in the unchallenged portion of its opinion addressing the Sherman Act claim, concluded that the defendant's sales to NCR were profitable and that the defendant's pricing policies were the result of "stiff competition". *Id.* at 15. The defendant's intent was simply "to increase sales volume", which is a normal business goal. *Id.* Noting the continued strong showing by the plaintiff in the business core market generally, the district court concluded that "[t]he intent that can readily be inferred ... is that of competition with Double H rather than its elimination." *Id.* at 18.[2]

On the basis of this record, the plaintiff has failed the test set forth in *O. Hommel.* There is no evidence to support a factual inference that the defendant is sacrificing present revenues for the purpose of injuring the plaintiff. The discount itself cannot support such

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2. The portions of the district court's opinion from which we have quoted deal with the plaintiff's claims against the defendant under section 2 of the Sherman Act, not section 2(a) of the Robinson-Patman Act. The quoted passages set forth the court's findings of fact, however, and are relevant here because the two claims against the defendant rested on roughly the same set of facts.

an inference unless we are to reject the holding of *O. Hommel* and conclude that price discrimination is indeed a per se violation of the Robinson-Patman Act. Neither is there any evidence that the plaintiff was injured beyond the mere loss of the cash register customers. The plaintiff is, and by all reckoning will remain, a strong competitor of the defendant's for the sale of cash register cores. The mere failure to gain new customers in this market cannot entitle the plaintiff to recover, else the free market system itself would be illegal.

For these reasons, and based on a review of the entire record, we are left with the "definite and firm conviction that a mistake has been committed" on the issue of the defendant's intent to engage in predatory pricing as proscribed by the Robinson-Patman Act. We conclude that the defendant did not violate the Act, and we will affirm the district court's judgment against the plaintiff on that ground.

IV.

The order of the district court entering judgment in favor of the defendant will be affirmed. The plaintiff shall bear the costs of this appeal.

GIBBONS, *Circuit Judge*, dissenting:

Double H. Plastics, Inc., a primary line competitor of Sonoco Products Co., appeals from a judgment in favor of Sonoco in Double H's action for damages and injunctive relief for Sonoco's violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982). The case was tried to the court. Double H contends that the court's finding of a violation of section 2(a) is not clearly erroneous, but that the finding that it suffered no injury to its business or property from that violation is clearly erroneous. Double H also contends that the

court erred as a matter of law in denying injunctive relief. Sonoco defends the trial court's factfinding on injury and its decision to deny injunctive relief, but as an alternative ground for affirmance contends that the court's finding of a violation of section 2(a) is clearly erroneous. The majority concludes that the court's finding of a section 2(a) violation is clearly erroneous. Thus it does not reach Double H's remaining contentions. I dissent from the judgment affirming the judgment in favor of Sonoco, because the trial court's finding of a section 2(a) violation is not clearly erroneous, and Double H's remaining contentions are meritorious.

I.

Double H manufactures plastic cores for rolls of paper tape used in adding machines and cash registers. Sonoco manufactures fiber cores used for the same purpose, and has since January of 1980 also made plastic cores. The business of manufacturing plastic cores has developed since 1974, when Harry Harp and his wife founded Double H. Plastic cores have advantages over fiber cores, of being light weight, dust free, and favorably priced. Between 1974 and 1980 Double H made substantial inroads in the market for adding machine cores, but was less successful in the cash register market.

In 1978 Sonoco attempted unsuccessfully to acquire Double H from Mr. Harp. When that effort failed it entered the business of making and selling plastic cores. With this development Sonoco became a competitor of Double H in the sale of plastic cores, while Double H remained a competitor of Sonoco in the sale both of plastic cores and of fiber cores, which plastic frequently displaced. Other competitors in the core market included Vulcan Corporation (plastic), Southern Metals & Plastics (plastic) and Crescent Paper Tube Co. (fiber).

Double H's Robinson-Patman Act charge involves efforts by Sonoco to preserve National Cash Register Company (NCR), and other cash register manufacturers, as purchasers of fiber cores. NCR is the largest seller of cash registers. It elected to use fiber cores for most of its needs. There is evidence that Sonoco sold fiber cores to NCR at prices below its list prices and lower than the prices offered to other customers. There is evidence, as well, that NCR informed Sonoco that from a utility viewpoint plastic cores were an acceptable substitute (App. at 689-90). A Sonoco internal memorandum, Exhibit DH 129, dated February 25, 1980, notes about NCR:

> In view of the price difference between paper and plastic, they plan to continue with paper cores. They also stated that economics will dictate the type core they will use. They have tested our plastic cores as well as Double H cores and found them to be satisfactory. The only real advantage they found in plastic was no paper dust and lighter in weight. Jim [Eggleston] commented further by saying these advantages are not enough to pay a premium price for. They plan to order some additional plastic cores where the prices are about the same as paper so they can do some further testing. Jim also pointed out from time to time they buy a small quantity of cores from Crescent so they can say they have two sources of supply. They continue to be very high on Sonoco and I am confident that we receive the majority of their volume. Sales for 1979 amounted to $650,000.

App. at 690. Another internal memorandum, Exhibit DH 135, dated June 10, 1980, notes, however:

> The main account on Group I [cash register] cores is N.C.R. and they have elected to stay with the paper cores until the economics favor switching to

> plastics. The remainder of the marketplace is reluctant to switch until NCR makes the change.

App. at 708. A third Sonoco internal memorandum, Exhibit DH 151, dated March 24, 1981, records that a Sonoco representative

> contacted Jim Eggleston of NCR who sez [sic] they have not moved to plastics and it remains a matter of economics. I did not want to say H & H had priced their core at paper prices and did not. Paper went up (cash reg.) 9.+% recently and we should be alert to plastic cash reg. core increases also. Jim said he certainly would contact us if anything changes.

App. at 878. The reference to H & H could be found to be either a reference to Mr. and Mrs. Harp, the owners of Double H, or a shorthand reference to their company name.

Testimony of an NCR employee tends to confirm that economics was the crucial factor in keeping NCR from switching, in 1980-81, from fiber to plastic cores. Testimony by a Sonoco employee tends to confirm that Sonoco believed in those years that the rest of the cash register marketplace would be reluctant to switch to plastic cores unless NCR did so. App. at 534-35.

There is also evidence from which it could be found that Sonoco held over ninety per cent of NCR's core business, and that its only serious competitor for that business was Crescent, which did not manufacture plastic cores. Thus it could be found that preventing a switch from fiber to plastic would not significantly benefit Crescent but would harm Double H. At the same time there is evidence that after Sonoco went into the plastic core business it experienced what it considered to be severe price competition in plastic cores from Double H. Exhibit DH 135 records that

"[p]ricing of this [plastic] product line continues to be a problem with our major competitor [Double "H"] holding down the market price."

The trial court began its analysis by noting that in order to establish a prima facie case of violation of section 2(a) of the Robinson-Patman Act a plaintiff must prove: (1) discrimination among customers in prices charged for sales of goods of like grade and quality; (2) such sales in interstate commerce; and (3) that the effect of the discrimination may be substantially to reduce competition or tend to create a monopoly.[1] In this case there was no real issue about the fact of discrimination in the pricing of fiber cores sold to NCR, or about such sales being in interstate commerce. The disputed issue, with respect to Double H's prima facie case was the sufficiency of its evidence on the third element, possible effect on competition. The court noted

> There are two basic means of meeting the competitive injury requirement: actual competitive injury shown by market analysis; (2) predatory intent from which competitive injury may be inferred.[2]

Noting that Double H offered no evidence on the effect of Sonoco's price discrimination in favor of NCR on market shares in the business machine core business generally, the court turned to the one remaining disputed issue, evidence of predatory

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1. The court relied, in outlining the elements of a prima facie case, on Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 119 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

2. The court relied, for these alternative means of proving likelihood of injury to competition on O. Hommell Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

intent, from which likelihood of injury to competition may be inferred.

The trial court found a predatory intent on Sonoco's part, in discriminating in the prices charged to NCR, from the fact that Sonoco intended to retain NCR as a fiber core customer for the cash register business in order to forestall an industry-wide switch to plastic cores.

The exhibits and other evidence referred to above, while perhaps not compelling a conclusion that Sonoco granted NCR price discrimination for the predatory purpose of preventing an industry-wide switch to plastic cores, certainly tend to support that conclusion. The court's conclusion as to Sonoco's intent in granting the price discrimination is a finding of fact, as to which Fed. R. Civ. P. 52 applies. The courts of appeals have recently been admonished that the task of determining from the evidence what intent motivated a given action is for the initial factfinder, not for the reviewing court. *Pullman-Standard v. Swint*, ——— U.S. ———, 102 S. Ct. 1781, 1788-92, 50 U.S.L.W. 4425, 4428-30 (1982). Given the deferential standard of review mandated by Rule 52 and the record evidence referred to above, I cannot say that the trial court erred in finding predatory intent. Such an intent permits an inference of the likelihood of competitive harm.[3] Thus I would accept the trial court's legal conclusion that Double H made out a prima facie case of a section 2(a) violation.

The majority acknowledges that NCR's refusal to

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3. O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). The *Hommel* case involved the so-called double inference issue: whether below cost pricing would support an inference of predatory intent, which would in turn support an inference of injury to competition. That issue is not presented here. The trial court relied on direct evidence of Sonoco's intention in granting price discrimination to NCR.

switch to plastic is a problem for Double H because NCR is regarded as a leader in the cash register industry, and until it switches smaller cash register manufacturers will not do so. Thus it acknowledges that by preventing such a switch Sonoco effectively forecloses the cash register market to Double H. Nevertheless, the majority concluded that

> [t]here is nothing in [Exhibit 708] that suggests that the defendant's primary purpose in offering the discount to NCR was to injure the plaintiff. Instead, the document simply reveals that the defendant was aware of the realities of its own marketplace, and evidence of such awareness, standing alone, cannot support an inference of predatory intent.

Typescript, 8-9. This is a blatant example of the appellate factfinding which Rule 52 prohibits. Moreover the inference which the district court drew is far more likely than that which the majority rejects. There is in this record virtually no evidence of any other purpose in giving a price discrimination to NCR than Sonoco's desire to continue to exclude Double H's product from the entire cash register market. If evidence of an intention to preclude Double H's product from an entire product market is not evidence of predatory intent, what evidence would satisfy the majority? The plain fact is that the majority disagrees with the economic decision made by Congress in applying Section 2(a) to primary line competition, and is determined to establish an impossible evidentiary standard.

Having concluded that Double H had established a prima facie case, the court turned to Sonoco's evidence in support of the affirmative defense, provided in section 2(b) of the Act, of a good faith effort to meet competition, 15 U.S.C. § 13(b) (1982), a defense which

the majority does not reach. That evidence was directed toward convincing the trial court that the price discrimination was directed not against Double H, its competitor in the plastic core business, but against Crescent, its competitor in the fiber core business. It consisted of testimony that NCR's purchasing agent, James T. Eggleston, told a Sonoco employee at one point that Sonoco's prices for paper core were higher than Crescent's. The occasion of the conversation was a proposed 1980 Sonoco price increase, to which NCR reacted negatively. Sonoco Exhibit 332. When told of Crescent's lower prices, Sonoco, according to Sonoco Exhibit 347, rolled back its NCR prices to their prior levels. The trial court, however, noted:

> There is no evidence in the record that any Sonoco employee attempted to verify the existence of a Crescent lower price. Without a diligent attempt to verify the purported lower price by Crescent, Sonoco has not met the good faith standard set forth in [FTC v.] *Staley* [324 U.S. 746 (1945)]. All that is established by defendant's evidence is that NCR negotiated a lower price for itself by presenting to Sonoco personnel an approximation of a competitor's lower price. Sonoco relies on its fear of losing business to Crescent as evidence of its good faith. Documents obtained from Sonoco's files indicate that, at least in 1978, it believed it had no competition for NCR's business. (Plaintiff's Exhibit DH-19 at 100125). Sonoco has produced no evidence that it believed that by 1981 its competition had changed so that threats by NCR to give its business to Crescent could reasonably be believed to be true.

App. at 1994-95. Exhibit DH-19 to which the trial court refers is an internal Sonoco memorandum dealing with prospects for a number of products. It lists five

customers for business machine cores, including NCR, and with respect to NCR lists "type of competition" as "None." There is deposition testimony by Eggleston that Crescent did sell "some high-volume items [to NCR] as well as low," but the court rejected it as "not sufficient to establish Sonoco's state of mind at the time it gave the discriminatory prices." There is also the reference in Exhibit DH 129, quoted above, to the fact that "Jim [Eggleston] also pointed out from time to time they buy a small quantity of cores from Crescent so they can say they have two sources of supply." The memo continues: "They continue to be very high on Sonoco and I am confident that we receive the majority of their volume." App. at 690.

The trial court concluded that Sonoco failed to meet its burden in proving that the unlawful price was given in a good faith effort to meet competition. Sonoco urges that this conclusion is clearly erroneous. I do not agree. There is evidence that Sonoco had over 90% of NCR's business, that it was confident of keeping that business, and that its concern was with competition from plastic cores, not from fiber cores manufactured by Crescent. Thus the record required the drawing of inferences as to Sonoco's good faith in meeting competition. The record evidence might well have permitted the factfinder to draw a different inference than that which was drawn, but that task is foreclosed to us by Rule 52.

I conclude, therefore, that the trial court did not err in holding that Double H made out a prima facie case of a violation of section 2(a), which was not rebutted by Sonoco's attempt to establish the section 2(b) meeting competition defense.

II.

Having concluded that Double H had proved a violation of section 2(a) the court turned to the

separate question whether the violation was one for which it could recover damages under section 4 of the Clayton Act. The court's method of analysis was correct, for the Supreme Court has noted:

> By its terms § 2(a) is a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition." (Emphasis supplied.) . . . Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to "[a]ny person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws. . . ." (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.

J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561-62 (1981).

This was a case involving primary line competition for sales to NCR and other cash register manufacturers. The antitrust injury Double H attempted to prove was lost profits it would have made from such sales. In support of that theory of injury Double H presented the testimony of its president, Mr. Harp. That testimony established that prior to 1980-81 Double H's plastic cash register core was quality-tested and approved by NCR as fully functional. Harp also estimated that total annual sales of cash register cores by all competitors amounted to $1.5 million. Harp estimated that if price discrimination by Sonoco to NCR in 1980-81 had not discouraged an industry-wide shift to plastic, his company would have achieved a 50% market share in each year. Harp testified that Double H could anticipate 10% pretax profit on such additional sales. Thus, he estimated, Double H lost

$75,000 in profits in each year that the price discrimination occurred.

The trial court rejected Double H's proof of injury, making four separate findings. Since these findings would support a judgment for Sonoco, I address them. Each is clearly erroneous.

The trial court found that "[t]he plaintiff has not shown this court at what price it could have offered plastic cores so as to encourage NCR to make the switch to plastic." To the contrary, Double H exhibits DH 60 and 81 and Sonoco exhibits 111, 112 and 113, in evidence, establish Double H's prices for cash register cores, and a comparison of those exhibits with Sonoco prices shown on its price lists show that Double H's cash register core prices were lower. *Compare* exhibit DH 81 *with* exhibits DH 170, 171. To take one example, for a 2 5/16" cash register core, Double H's price of $8.12 per thousand is lower than Sonoco's discriminatory price to NCR of $9.59 per thousand, and much lower than Sonoco's $11.33 per thousand price charged to other customers. There is no evidence in the record impeaching these price differentials.

The trial court also found that "[t]here is no evidence that Double H would have sold plastic cash register cores at prices that could compete with paper cash register cores." To the contrary, the exhibits referred to in the preceding paragraph establish that Double H's plastic core prices for cash register cores were in fact quite favorable when compared with Sonoco's prices to customers other than NCR. Moreover, the exhibits referred to in Part I above show that Sonoco's discriminatory prices to NCR were arrived at with knowledge that only economics prevented NCR from overcoming inertia and making a product switch.

The trial court found that "[i]t is mere speculation that, had Sonoco not sold at an unlawful price, Double

H would have captured all of the volume of sales to NCR. It is even more speculative that Double H could then have captured the rest of the cash register core market." Here the court misstates the testimony. Mr. Harp did not contend that Double H would capture all of NCR's business or all of the cash register core market. He made an estimate that Double H had a potential market share of fifty percent. App. at 304-05. Since exhibits originating with Sonoco establish that Double H already held 80% of the unforeclosed market in 1980, and 70% in 1981, Harp's estimate is clearly conservative rather than speculative. *See* exhibit DH 106; Sonoco exhibit 238. Indeed, Sonoco's post-trial proposed findings of fact concede Double H's success in the unforeclosed market. App. at 1750, 1859. The one market segment in which Double H was not successful was cash register cores, where NCR, the industry leader, received discriminatory prices. Given the uncontradicted evidence that there was no technical reason why NCR did not switch to plastic, the suggestion that price discrimination foreclosed Double H from the cash register core market is anything but speculative. Indeed, on the record before us no other inference is permissible, for there is no other evidence of any reason for Double H's lack of success.

Finally, the court found that Mr. Harp's projection of a 10% profit on a $750,000 a year sales volume "is certainly without support." However, Double H's financial statements for the year 1979, 1980 and 1981 are in evidence. Exhibits DH 168, 167, 160. They establish that Double H earned pretax profits in excess of 10% on sales for a large part of its business history. Indeed, Sonoco's own projections of Double H's profitability, made in connection with its study of a possible acquisition, suggest profit margins on sales far in excess of those projected by Mr. Harp. Exhibit DH 19, App. at 618. Sonoco attempts to defend the trial court's

misinterpretation of the record by referring to a remark made by Mr. Harp during cross-examination about his 10% profit estimate:

> Q Mr. Harp, from time to time both in Answers to Interrogatories in this litigation and, indeed, in your testimony you've made reference to a 10 percent profit as a percentage of sales as a reasonable profit; is that right? Where did you get that number?
>
> A Well, I think I got it out of the air. It's a number that I consider a reasonable profit. I didn't generate it with any special thing. I take it as a number I would not like to operate under, and I'm not too unhappy if I'm not too far over it.
>
> Q Mr. Harp . . . Could you give the last part of that answer again
>
> A I said I'm going to be unhappy if I go under the 10, and I'm not going to be unhappy if I go over it.

App. at 346-47. From this cross-examination Sonoco would have us conclude that Double H's estimate of lost profits is "certainly without support." To do so, however, we would have to disregard the Double H financial statements in evidence, and Sonoco's own acquisition study in evidence. Moreover we would have to take Mr. Harp's testimony out of context. The meaning his words convey, plainly, is that for purposes of estimating additional sales he would be satisfied with pricing which would return a net pretax profit of ten percent. Indeed the surrounding questions in the sequence show the relationship between the desired mark-up and pricing. App. at 346-50. The entire sequence shows that Mr. Harp correctly understood that the thrust of the examination was not at whether he could make profits on sales but at whether he could

price his product low enough to get the sales. The 10% estimate is quite responsive, for it indicates that although, as evidenced by its financial statements, Double H had been making more than a 10% mark-up, it could price its products lower and still operate at a satisfactory level of profitability.

Section 4 Clayton Act plaintiffs who have established a violation of the antitrust laws are entitled to prove damages through "'probable and inferential, as well as direct and positive proof.'" *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931)). Moreover, the practical difficulties facing antitrust plaintiffs attempting to show what profits they would have made had sales not been foreclosed by illegal conduct has prompted the Supreme Court to observe:

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Pictures, Inc., supra*, at 264.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969). Moreover, in the context of a Robinson-Patman Act case the Court has explained the reason for its willingness to relax proof of injury standards which might otherwise apply.

> Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as Bigelow, that it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981).

The trial court's supported conclusion that unlawful price discrimination occurred places the case within the damage rules announced in the foregoing case. The trial court's conclusion that Double H's proof of injury is unsupported by evidence or, is speculative, rests on findings of fact which are clearly erroneous. The evidence to which I have referred suffices to establish a prima facie case of injury to Double H's business in the form of lost profits in the amount of $150,000. Sonoco points to no record evidence impeaching that to which I have referred. Thus Double H's prima facie case of injury to its business, unrebutted, requires the entry of a judgment in its favor for that amount, trebled.

III.

Double H also seeks injunctive relief against continuance of the Robinson-Patman Act violation which the trial court found. Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), provides for such relief

"against threatened loss or damage by a violation of the antitrust laws." Although the trial court's opinion is not entirely clear, it appears to hold that as a matter of law a plaintiff which cannot prove a sufficient injury to its business or property to obtain relief under section 4 of the Clayton Act cannot obtain a section 16 injunction. That analysis, if it was intended, is inconsistent with the plain language of section 15, and with the Supreme Court's most recent interpretation of it.

> In keeping with the Robinson-Patman Act's prophylactic purpose, § 2(a) "does not 'require that the discriminations must in fact have harmed competition.'" *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562, 101 S. Ct. 1923, 1927, 68 L.Ed.2d 442 (1981), quoting *Corn Products*, 324 U.S. at 742, 65 S. Ct. at 969. This reasonable possibility of harm is often referred to as competitive injury. Unless rebutted by one of the Robinson-Patman Act's affirmative defenses, a showing of competitive injury as part of a prima facie case is sufficient to support injunctive relief, and to authorize further inquiry by the courts into whether the plaintiff is entitled to treble damages under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 15 (1976 ed., Supp. V).

Falls City Industries, Inc. v. Vanco Beverage, Inc., 103 S. Ct. 1282, 1288-89, 51 U.S.L.W. 4275 (1983). Thus the court's section 2(a) violation finding, which I do not find clearly erroneous, was itself a sufficient predicate for injunctive relief, without any further inquiry into actual injury to the plaintiff's business or property. Moreover, the trial court's rejection of Double H's unrebutted prima facie case of section 4 injury is clearly erroneous. Thus even under the trial court's analysis a reversal of the denial of injunctive relief is required.

IV.

The judgment appealed from should be reversed insofar as it dismissed Double H's claims for treble damages under section 4 of the Clayton Act and for injunctive relief under section 16 of the Clayton Act. The case should be remanded: (1) for the entry of an appropriate award of damages, trebled; (2) for the framing of an appropriate injunction against price discriminations by Sonoco to NCR; and (3) for the determination of counsel fees.[4] Thus I respectfully dissent.

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4. Because Double H has not pointed to any additional relief which would be available if the trial court had considered the merits of its pendent state law claim for damages for interference with prospective economic advantage, I have no reason to address that ground for appeal. Double H does not appeal from the dismissal of its Sherman Act claim.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Opinion of United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-1904

January 21, 1983

DOUBLE H PLASTICS, INC.,

—v.—

SONOCO PRODUCTS COMPANY.

MEMORANDUM OPINION AND ORDER

WEINER, J.

Plaintiff, Double H Products, Inc. ("Double H"), brings this action against defendant, Sonoco Products Company ("Sonoco"), alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2;[1] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1973) (hereinafter referred to as Section 2(a) of the Robinson-Patman Act[2]); and Commonwealth of Pennsylvania common

1 Section 2 of the Sherman Act provides, in pertinent part, that: "Every person who shall. . .attempt to monopolize. . .any part of the trade or commerce among the several States. . .shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding fifty thousand dollars. . .in the discretion of the court."

2 Section 2(a) of the Robinson-Patman Act provides, in relevant part that: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade or quality, where

law, in particular, intentional interference with plaintiff's prospective business relations.

The plaintiff claims that Sonoco engaged in predatory pricing and other anticompetitive conduct to drive Double H out of business. It is also Double H's contention that Sonoco has sold certain products to National Cash Register ("NCR") below cost levels as part of a "strategy of monopolizing the business machine core market by discouraging paper core users from shifting to plastic before Sonoco has completed its conquest of Double H, its only serious competition in plastic." (Plaintiff's Post-Trial Memorandum, p. 25). Plaintiff seeks damages and injunctive relief. The case was tried to the court sitting without a jury.

I. FACTUAL ANALYSIS

Business machine cores, the product on which Double H's claims are based,[3] are cylinders around which rolls of paper are wrapped. They are made of either plastic or fiber.[4] Business machine cores are sold to paper converters who wind paper around the cores to produce finished paper rolls for such business machines as cash registers and adding machines.

Sonoco manufactures both plastic and paper cores. It has long been in the business of manufacturing fiber cores, com-

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either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States. . .and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . .

3 Plaintiff contends that business machine cores are the relevant product market. Sonoco claims that Double H has vacillated in its definition of the relevant product because at one point it included cores other than business machine cores. No prejudice appears to have been suffered by Sonoco. Sonoco has not even presented evidence that the inclusion of other cores would be proper. We therefore accept business machine cores as the relevant product.

4 Fiber cores are cardboard or paper cores.

peting mainly with Crescent Paper Tube Co. ("Crescent") of Kentucky. Sonoco went into the production of plastic cores in January, 1980.

The plastic business machine core business is relatively new. Double H is a primary force in that business, a company founded in 1974 by Mr. Harry Harp who, along with his wife, owns all of the stock in Double H. Prior to plaintiff's entry into the manufacturing of plastic business machine cores, paper cores were the leading type of cores sold. However, the availability of plastic cores was attractive to some customers of paper cores. Customers preferred plastic cores because they were lighter in weight, dust free and sold at a favorable price.

Sonoco began to lose a large number of its paper core customers to Double H. To continue in the machine core business, Sonoco had two alternatives. It could either acquire Double H or it could enter the plastic core business itself. In 1978 Sonoco personnel contacted Mr. Harp for the purpose of acquiring Double H and negotiations went on throughout the year. In early 1979 Mr. Harp ultimately rejected Sonoco's offer.[5]

After Sonoco was unsuccessful in its effort to acquire Double H, it bought the equipment necessary for the production of plastic cores. In January, 1980, two months after the equipment was installed and delivered in Sonoco's Pickney plant in Union, South Carolina, Sonoco began processing and selling plastic cores. The company also adapted an extrusion machine that it already owned. It expended around $210,000 in buying the equipment, modifying the machine it owned, and expanding the plant. Sonoco experienced production difficulties for the first six months of operations. Those problems were worked out.

When Sonoco began selling plastic business machine cores, it shared the market with Double H and two other companies, Vulcan Corporation ("Vulcan") of Cincinnati, Ohio and Southern Metals & Plastics ("Southern") of Memphis, Tenne-

5. Mr. Harp testified that he was displeased with the terms of the offer, including a covenant not to compete, as well as the salary structure for himself and his employees.

see. Sonoco's initial list price was $7.80 per thousand for 2 1/4" cores.[6] At that time, Double H's list price for those cores was $7.50 per thousand. Southern's list price was $8.21 with frequent off-list sales at lower prices and Vulcan had a list price at $7.95 effective February 1, 1980.

In March, 1980, Sonoco introduced a 5% discount for truckload orders, bringing its price to $7.41 for such orders. In July, 1980, it announced a price increase, telling its sales agents that the cost of the necessary raw material, polystyrene, had increased from $.28/lb. in January, 1979[7] to a current price of $.50/lb. It sought a 10% price increase with the expectation that its chief competitor, Double H, would also increase its price. When informed by customers that its price was too high and that Double H did not raise its price, Sonoco chose not only to rescind its increase but to reduce the price. On September 2, 1980, Sonoco wrote to its customers announcing a new reduced price of $7.15 per thousand. It eliminated its truckload discount at that time.

On October 23, 1980, Double H began offering a 5% truckload price, after receiving feedback from its customers concerning Sonoco's prices, thereby reducing its price to $7.12 per thousand for a truckload. Approximately 25% of Double H's customers received the truckload price. At that time, Double H used independent salesmen who carried its product as well as other companies' products. They received a 5% commission until the truckload discount went into effect at which time their commission was cut to 2 1/2%. Double H, which until this time had had to make little effort to obtain customers, began advertising, for the first time, in a trade magazine.

In February, 1981, Sonoco again considered a price increase. An approach to one of its customers concerning that possibil-

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6 Both parties agree that prices on the 2 1/4" natural adding machine core, the most common size sold, fairly represents the general level for extruded plastic business machine cores.

7 This was the time when Sonoco went into the plastic machine core business.

ity resulted in a warning by the customer that it would give all of its business to Double H if Double H promised it a six month price protection. Nevertheless, Sonoco announced a price increase in March, 1981, to become effective in May, with the explanation that the increase was necessitated by raw material increases. In monitoring customers' reactions to the increase, Sonoco determined that it was risking the loss of a number of customers if Double H held its price. After postponing the increase, Sonoco was advised by at least two customers that the proposed increase would have caused them to give their business to Double H. Sonoco then announced that it would not increase its prices "until further notice." (Defendant's Exhibit 275).

Although until now Double H appeared to be Sonoco's sole serious competitor, Southern began competing in its pricing and, at times, undersold both Sonoco and Double H throughout 1981 as well as 1982.

In July, 1982, Sonoco announced a price increase for the third time. The price was to go up by 9 1/2% effective August 30, 1982. This time customers warned it that Southern and Vulcan were favorable alternatives to Sonoco in that it was their belief that neither company would raise its price for the balance of 1982. Some customers threatened to switch from plastic cores to paper cores if the increase went into effect. Instead of increasing its prices by 9 1/2% on August 30th, Sonoco announced it would increase the price by 6%. Even this increase met with resistance from some customers. Sonoco was required to meet the lower prices of competitors by scaling back its 6% increase to a 1% increase for one of its customers in order to retain its business. In the course of monitoring the pricing of its competitors, Sonoco personnel learned that Double H had announced a 4% increase in its prices with elimination of its truckload discount. However, Double H rescinded the price increase upon learning of Sonoco's decision to scale back its own increase.

II. LEGAL ANALYSIS: SHERMAN 2

The elements of attempting to monopolize under Section 2 of the Sherman Act has been established in the Third Circuit. The plaintiff has the burden of proving: (1) the relevant market; (2) that "the actor has the specific intent to monopolize the relevant market"; and (3) that "the actor has sufficient market power to come dangerously close to success." *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3d Cir. 1975). Additionally, the plaintiff is required to show that the defendant engaged in "predatory or anticompetitive conduct directed to accomplishing the unlawful purpose." *Chillicothe Sand & Gravel v. Martin Marietta Corp.*, 615 F.2d 427, 430 (7th Cir. 1980).[8] The plaintiff is also required to show that defendant's unlawful conduct proximately caused plaintiff's injury. Clayton Act § 4, 15 U.S.C. § 15 (1973).

In the present case, plaintiff relies on defendant's pricing practices to prove the requisite anticompetitive conduct and specific intent. Specifically, it argues that Sonoco engaged in predatory pricing. Double H also argues that Sonoco's announced price increases for plastic cores, followed by rescissions of the increases, were executed with the hope and expectation Double H would follow suit. Sonoco's motive, plaintiff argues, was to "enforce price obedience by Double H as part of its efforts to control the business machine core market." (Post-Trial Memorandum of Plaintiff, p.22).

Predatory pricing is below cost pricing wherein there is a "deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L.Rev. 697, 698 (1975). To determine "cost" for purposes of finding below cost

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8 A recent Third Circuit opinion notes that conduct has not been expressly adopted as an element of attempted monopolization but appears to have accepted it as implicitly required. *Sunshine Book Ltd. v. Temple University*, No. 81-3129, slip op. at 7, n. 9 (3d Cir. December 28, 1982) (citing *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978)).

pricing, the generally accepted standard is "average variable cost."[9] rather than "marginal cost."[10] *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 349 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 1711 (1982); *Sunshine Books Ltd. v. Temple University*, 524 F.Supp. 479, 481 (E.D. Pa. 1981). Predatory pricing, then, is pricing below the average variable cost of manufacturing and selling a company's product. The inference that can be drawn from predatory pricing is that the defendant is acting with anticompetitive intent.

The Third Circuit has indicated that it favors the Areeda and Turner analysis as set forth in their 1975 law review article but, as yet, has not fully embraced it. *O. Hommel Co.*, 659 F.2d at 352.[11] Other circuits, however, have accepted the average variable cost standard. *See, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 51 U.S.L.W. 3254 (Oct. 4, 1982); *Chillicothe Sand & Gravel v. Martin Marietta*, 615 F.2d 427 (7th Cir. 1980); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

"Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote." *Northeastern Telephone Company v. American Telephone and Telegraph Company*, 651 F.2d 76,88 (2d Cir. 1981). It is for this reason that a court should be prudent in reading the evidence, in its determination that predatory pricing has, in fact, occurred and

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9 Variable costs are costs that vary with changes in output. The average variable cost is the sum of all variable costs divided by output. 88 Harv. L. Rev. at 700.

10 Marginal cost is the increment to total costs that results from producing an additional increment of output. *Id.*

11 The Third Circuit again refused to embrace the Areeda-Turner analysis or a modified version of it in *Sunshine Books, Ltd. v. Temple University* No. 81-3129, *supra* at 8. The court, however, did accept the analysis for purposes of appeal.

that it implies anticompetitive intent. The proof of predatory pricing raises a rebuttable presumption that the offending company intended, at the time it set its price, to presently forego profit so as to eliminate competition. *William Inglis*, 668 F.2d at 1034. Because it is proof of specific intent that is at issue, this court must be cautious in ascribing intent *ex post facto* based on factors that became known *after* the pricing was set. With that caution in mind, we turn to plaintiff's proof of defendant's alleged predatory pricing.

To prove predatory pricing in the case *sub judice*, plaintiff's attorneys directed an expert accountant to analyze Sonoco's accounting records[12] using the Areeda and Turner definitions of variable cost as set forth in their antitrust textbook, III P. Areeda and D. Turner, *Antitrust Law* 173 (1978). Contrary to their 1975 definition of variable costs, Areeda and Turner established that variable costs include all costs except (1) capital costs attributable to investment in land, plant and equipment; (2) property and other taxes unaffected by output; and (3) depreciation on plant. *See* III Areeda and Turner, *supra* at 715(c). It bears noting, however, that the Third Circuit has not adopted this latter version of variable costs. In *O. Hommel Co.* the court stated that:

> Fixed costs are those which *do not* vary with changes in output, and variable costs are costs which *do* vary with changes in output. Variable costs typically include such items as materials, fuel, labor directly used to produce the product, repair and maintenance, etc.

659 F.2d at 349, n. 11 (citations omitted) (emphasis original). The court would appear to require an analysis of costs to determine which do, in fact, vary with output. "The determination of which costs are variable and which fixed will vary with the facts of each case." *William Inglis*, 668 F.2d at 1038.

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12 These accounting records included the following Profit and Loss (P & L) Statements: Plant, Master Department, Period Staff, Service Departments, and Plant Management as well as Sonoco's "Direct Product Cost" sheets.

Nevertheless, with the 1978 Areeda and Turner definition as the standard, plaintiff's expert reclassified some of Sonoco's costs to conform to that standard. In so doing, he placed the following costs into a category he called "additional variable costs": (1) assignable period costs; (2) plant costs; and (3) MTA costs.[13]

Assignable period costs include the salaries of Sonoco's supervisory group, plus fringe benefits, and equipment depreciation. Plant management costs include salaries and fringe benefits for plant superintendents, managers, and secretarial personnel, building depreciation, janitorial salaries, and buildings and ground maintenance. MTA costs include sales costs, regional administration, and corporate administration (including corporate medical department and mailroom, corporate personnel, and other corporate support functions). Corporate administration takes place in the company's Hartsville, South Carolina headquarters rather than the Pickney plant where the plastic machine cores are produced. MTA also includes divisional administration, corporate interest, and technical development.

The extent to which some or all of these costs are variable is in doubt. In its own post-completion review, a Sonoco employee stated that incremental MTA and overhead costs "do tend to increase over time with volume as experience has clearly demonstrated." (DH. Ex-172 at 100326). That statement fits the definition of variable costs since they are costs that tend to increase with volume. In a deposition, the author of the report explained that such increases were probably in allocations based on increased capital investments. He testified that he was without information to conclude that such costs had experienced actual cash increases.

Traditionally, management expenses and irreducible overhead are considered fixed rather than variable. *Sunshine Books*, 524 F.Supp. at 482; *Northeastern Telephone Company v. American Telephone and Telegraph Company*, 651 F.2d 76, 86. Of course, a company's experience is the most telling

13 "MTA" stands for marketing, technical and administrative costs.

evidence of the category into which costs belong. Sonoco's general manager of its plastics division testified that when the plastic core equipment was installed there was an increase in assignable period costs because of depreciation costs. If operations were stopped and the equipment sold, assignable period costs would be decreased to reflect the decrease in depreciation. He further testified that none of the plant management costs changed when the equipment was installed. The installation of the equipment had some effect on MTA although most costs were fixed. He testified that of the costs labeled "additional variable costs" in plaintiff's analysis, a great majority would not vary depending on the output of the business machine cores.

Plaintiff's accounting expert also recalculated Sonoco's labor costs by increasing the number of operators from 2 to 2 1/2. This resulted in an overstatement of direct labor costs because the plant, in fact, uses a two-person crew operating one shift.

With these recalculations, plaintiff's expert determined that Sonoco had been selling below its variable costs for plastic adding machine cores ("add cores") over a two year period by more that 10%. He also determined that the defendant was selling its paper cash register cores ("cash cores") and paper add cores to NCR below its average variable cost by 25%-38% on add cores and 4% on cash cores since October, 1980.

Defendant challenges both the recalculations performed by plaintiff's expert and the conclusions to be drawn from its own documents introduced at trial. The chalienges to the plaintiff's expert go to the weight to be given the evidence of predatory pricing. *D. & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, No. 81-5493 (9th Cir. November 2, 1982). This court, as the finder of the fact, is unpersuaded by plaintiff's proof of predatory pricing. While it is true that the defendant has not offered its own charts and proof of pricing above average variable cost, such proof is not the defendant's burden of proof in the first instance. Defendant has sufficiently cast doubt on plaintiff's method of analysis of fixed and variable

cost to require a finding by this court that predatory pricing has not been proven.

Further, even if we were to find that predatory pricing has, in fact, been shown, we are persuaded that Sonoco's pricing, including its announced increases and ultimate rescisions of price, was not done with the requisite specific intent. We would be unable, then, to conclude that the intent to be inferred from a finding of predatory pricing, were such a finding made, is justified in this case.

The documents and testimony presented by Sonoco support an inference that its behavior over the past two years has been a result of stiff competition in selling business machine cores. The intent demonstrated by the defendant is to increase sales volume. As the Supreme Court has stated, increasing sales and increasing market share are normal business goals. *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 612, n. 1 (1977). In the landmark Section 1 Sherman Act case of *United States v. Aluminum Company of America*, 148 F.2d 416, 430 (2d Cir. 1945), Judge Hand proclaimed: "The successful competitor, having been urged to compete, must not be turned upon when he wins."

In documents from Sonoco's files, memoranda between Sonoco's sales manager and its sales force highlight the price competition it encountered when it attempted to enter the plastic machine core business. Sonoco found its slightly higher pricing problematic in its effort to achieve volume. Its attempt to increase prices was met with a good deal of customer resistance as is documented by its internal memoranda. The resulting reduced price proves no more than the fact that price is the crucial factor in the selling of business machine cores and the beneficiaries of the pricing battle are the customers. This would appear to meet the goals of the antitrust laws rather than to violate them.

Double H did suffer from Sonoco's appearance on the scene. Rather than passively receiving orders and neglecting to "make house calls," it was forced to venture into its market and exhibit its wares. Its discomfort with competition, while

sympathetic, does not automatically rise to victimization by a large, ill-intended corporation.

The pricing of Sonoco's fiber cores, at first glance, would appear predatory in that it sold its fiber add cores to NCR below its direct product cost. It has, however, sold its fiber cash register cores at a profit. The bulk of Sonoco's sales to NCR is cash register cores. When both fiber add cores and cash register cores are combined, Sonoco's fiber core line remains profitable. Its expressed intent to have NCR switch to Sonoco plastic cores, if and when that switch occurs, is a normal, in fact, expected business goal. Sonoco has successfully raised its prices to NCR even though it has met with their resistance. Its documented efforts to raise its price to NCR for its fiber cores belies the conclusion that it has intentionally sold below cost to keep NCR from switching to plastic so long as Double H is in the picture.

Double H also contends that Sonoco's effort to acquire Double H is another example of its anticompetitive conduct. Plaintiff points to Sonoco's effort to have Harry Harp and his sons sign a covenant not to compete as evidence of its intent. Yet, such a covenant is universally accepted as valid so long as it is reasonable. *Westec Security Services, Inc. v. Westinghouse Electric Corp.*, 538 F.Supp. 108, 122 (E.D. Pa. 1982).

Finally, documents in Sonoco's files indicate that they expected their market share for the next five years to be heavily influenced by Double H. Double H's market share is projected at remaining at 60% for 1982-1986 while Sonoco's projected share is 30% for 1982-83, 31% for 1984-85 and 32% for 1986. (Defendant's Exhibit 305). The intent that can readily be inferred from this mid-1979 calculation is that of competition with Double H rather than its elimination.

Having found that plaintiff did not meet its burden in proving specific intent or anticompetitive conduct, this court need not reach the question as to whether or not there was a dangerous probability of Sonoco succeeding in its alleged attempt to monpolize.

III. LEGAL ANALYSIS: ROBINSON-PATMAN ACT

To establish a prima facie case of unlawful price discrimination under the Robinson-Patman Act, the plaintiff must show that: (1) the defendant has discriminated in the prices it has charged different customers for goods of "like grade and quality"; (2) the defendant is engaged in commerce and the sale was made in commerce; (3) the effect of such discrimination may be substantially to reduce competition or tend to create a monopoly. *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 119 (3d Cir. 1980). Once a plaintiff has established a prima facie case, defendant may rebut it by affirmatively proving that the discrimintation was justified in a good faith effort to meet competition from others.[14]

In addition to proving a violation of the Robinson-Patman Act, to recover, the plaintiff must prove that he has actually been injured in his business or property under Section 4 of the Clayton Act. 15 U.S.C. § 15. Proof of a violation of § 2(a) of the Robinson-Patman Act does not allow a court to presume damages. *J. Pruett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 563 (1981).

It is not disputed in this case that Sonoco sold fiber business machine cores to NCR below the prices at which it sold the products to other customers. Nor is there a dispute that the sales were "in commerce." Defendant argues that the evidence presented by the plaintiff is insufficient to carry the burden of proof as to whether or not competitive injury has resulted. There are two basic means of meeting the competitive injury requirement: (1) actual competitive injury shown by market analysis; (2) predatory intent from which competitive injury may be inferred. *O. Hommel Co.*, 659 F.2d at 347. In determining competitive injury, it is the detrimental effect *on competition*, rather than a concern with individual *competitors* that is the focus. *Id.* (emphasis original) (citation omitted).

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14 *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . to any purchaser . . . was made in good faith to meet an equally low price of a competitor . . . . 15 U.S.C. § 13(b).

In the present case, the plaintiff has not offered evidence as to the effect Sonoco's price discrimination has had on market shares for the business machine core business generally. It has theorized, however, that such price discrimination "has precluded the competition that would otherwise exist among (sic) Double H and Sonoco for sales of cash register cores, both to NCR and to smaller customers who will not switch to plastic until NCR leads the way." (Plaintiff's Post-Trial Memorandum, p. 38). A similar theory of NCR's leadership position is expressed in an internal memorandum in which Sonoco's general manager of its plastics division states: "The main account on Group 1 (cash register) cores is N.C.R. and they have elected to stay with the paper cores until the economics favor switching to plastics. The remainder of the marketplace is reluctant to switch until N.C.R. makes the change." (P. Ex. DH-135 at 100382). By defendant's own admission, it was Sonoco's intent to retain NCR with the expectation that other paper converters would not convert to plastic unitl NCR did.

Testimony of NCR personnel confirms the fact that economics is the crucial factor in keeping NCR from switching from paper to plastic cash cores. The testimony reveals that while other companies have occasionally attempted to sell plastic cores to NCR, they are unable to compete with Sonoco's prices. (Eggleston Dep. at 7-8, 40-43). Defendant points to evidence that some paper converters have, in fact, switched from paper to plastic cores. (Eggleston Dep. at 8, Harp Tr. 50). It is defendant's argument that because NCR has not, in fact, maintained a leadership position, no competitive harm has been shown.

We find, however, that the statements that one or two converters have switched to plastic cores is insufficient to disprove competitive harm. Further, the intent expressed in the Sonoco document, sufficiently establishes predatory intent in Sonoco's effort to retain NCR as a paper cash core customer thereby forestalling the industry-wide switch from paper to plastic. From the finding of predatory intent we may infer injury to competition. *O. Hommel Co.*, 659 F.2d at 347, citing *Pacific Engineering & Prod. Co. v. Kerr-McGee Corp.*, 551

F.2d 790, 798 (10th Cir. 1977), *cert. denied* 434 U.S. 977 (1977).

Because plaintiff has established a *prima facie* case of violation of Section 2(a) of the Robinson-Patman Act, we turn to the defendant's proof of its affirmative defense: that the illegal price discrimination was made in a good-faith effort to meet competition. "The test for determining when a seller has a valid meeting competition defense is whether a seller can 'show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. " *Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69, 82 (1979) (quoting *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760 (1945)). "A good faith, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) defense." *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978).

The conduct required of the seller asserting the defense has been discussed by the Supreme Court and the Third Circuit. In its landmark case of *FTC v. Staley*, 324 U.S. 746 (1944), the Supreme Court found that the defendant had failed to rebut the prima facie price discrimination suit established against it because it presented no evidence that the company's salesmen, after receiving verbal information that its competitors had offered a lower price, made any effort to investigate or verify the information. *FTC v. Staley*, 324 U.S. at 758. Nor was evidence presented that the salesmen had "knowledge of their informant's character and reliability." *Id.* There was an "entire absence of any showing that respondents had taken any precaution to conduct their business in such a manner as to prevent unwarranted discriminations in price." *Id.* at 759. The mere acceptance of the word of a company official, without corroboration by investigation or verification, is insufficient to prove good faith. *Viviano Macaroni Co. v. F.T.C.*, 411 F.2d 255, 259 (3d Cir. 1969).

Because there is fear that direct price communication between competitors will lead to the evils of price collusion,

Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. at 82, some limits on price verification are necessary. What is required is a showing of reliability of the informant who has personal knowledge of the bidding, coupled with an attempt to investigate by asking for more information about the competitive bid and the making of a credible threat of termination of purchases in the absence of a second offer. *Id.* at 84, n. 17.

In the case *sub judice* Sonoco has presented evidence that it was warned of the loss of NCR's business. NCR's purchasing agent, James T. Eggleston, told a Sonoco employee that its prices were higher than Crescent's for paper cores. Eggleston was unable, in a deposition, to recall in detail the amount of information he gave Sonoco. He testified that he would have given Sonoco a percentage range of the amount Sonoco's price exceeded Crescent's price. There was, at that time, a proposed price increase by Sonoco presented to NCR to which NCR reacted negatively. (Eggleston dep. at 27). Sonoco records show that, in reaction to being told that Crescent bid lower, it rolled back its prices to their level as of January, 1980 as requested by Eggleston. Sonoco's own records indicate it did so "to meet competitive pricing from Crescent." (Defendant's Exhibit 347).

There is no evidence in the record that any Sonoco employee attempted to verify the existence of a Crescent lower price. Without a diligent attempt to verify the purported lower price by Crescent, Sonoco has not met the good faith standard set forth in *Staley* and *Vivano*. All that is established by defendant's evidence is that NCR negotiated a lower price for itself by presenting to Sonoco personnel an approximation of a competitor's lower price. Sonoco relies on its fear of losing business to Crescent as evidence of its good faith. Documents obtained from Sonoco's files indicate that, at least in 1978, it believed it had no competition for NCR's business. (Plaintiff's Exhibit DH-19 at 100125). Sonoco has produced no evidence that it believed that by 1981 its competition had changed so that threats by NCR to give its business to Crescent could reasonably be believed to be true. The testimony of Eggleston that Crescent does sell it "some high-volume items as well as low" (Eggleston Dep. at 35-36) is not sufficient to establish

Sonoco's state of mind at the time it gave the discriminatory price.

Because Double H has established a *prima facie* case of unlawful price discrimination and defendant has failed to meet its burden in proving the unlawful price was given in a good-faith effort to meet competition, we find that Sonoco has violated Section 2(a) of the Robinson-Patman Act. The issue of actual injury to Double H will be discussed in Section V.

IV. STATE LAW CLAIM

Plaintiff argues that once it has established an antitrust violation under either § 2 of the Sherman Act or § 2(a) of the Robinson-Patman Act, it has sufficiently proven the Pennsylvania common law tort of intentional interference with its prospective business relations. Because we find that the requisite proof for damages has not been made for the Robinson-Patman violation, and plaintiff relies on the same proof for the common law claim, we shall not decide the tort allegations. Instead, we shall turn to the issue of damages.

V. DAMAGES: ROBINSON-PATMAN VIOLATION

It is plaintiff's argument that the proof of damages is substantially relaxed once it has established the elements of liability under the antitrust laws, citing *Rea v. Ford Motor Co.*, 497 F.2d 577, 591-92 (3d Cir. 1974), *cert. denied*, 419 U.S. 868 (1974). While it is true that a court is required to "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for damages from a partial or total exclusion from a market," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), we must be presented with "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 562 (1981). Because proof of a violation of § 2(a) of the Robinson-Patman Act "establishes only that injury *may* result," *id.* (emphasis original), more proof is necessary for plaintiff to recover damages.

In the case *sub judice* the only evidence submitted toward proving plaintiff's damages under the Robinson-Patman Act, the only antitrust violation determined to have occurred, was Mr. Harp's testimony that he could have realized a 10% profit had he made sales to those cash core customers who had not switched from paper to plastic due to the unlawful price as well as to NCR. The speculative nature of both his profit margin of 10%, which he admits to having come "out of the air," and the extent to which he could have captured those customers, requires that this court find that plaintiff's case fails for lack of proof.

Nowhere does plaintiff present any evidence that it could have made aditional sales to NCR. As noted earlier, price was a crucial factor to NCR's purchasing agent. The plaintiff has not shown this court at which price it could have offered plastic cores so as to encourage NCR to make the switch to plastic. Further, the more likely occurrence presented by the evidence is that, had Sonoco offered its paper cores to NCR at the same price it offered them to its other customers, NCR would have bought from Crescent. There is no evidence that Double H would have sold plastic cash register cores at prices that could compete with paper cash register cores. The fact that it has not yet sold a significant amount of such cores does not prevent it from presenting to this court some reasonable estimate of the price for which they could be sold. It is mere speculation that, had Sonoco not sold at an unlawful price, Double H would have captured all of the volume of sales to NCR. It is even more speculative that Double H could then have captured the rest of the cash register core market.

In *J. Truett Payne* the Supreme Court reviewed two earlier cases in which damages were inferred from the evidence. In *Zenith* the court found the evidence sufficient to support a jury finding of damages where the plaintiff had compared its sales in Canada, where it was subject to an antitrust violation, with it sales in the United States, where it was not. In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 259 (1946), "the plaintiff adduced evidence not only comparing its profits with a competitor not subject to the violation but also comparing its

profits during the time of the violation with the period immediately preceding the violation." *J. Truett Payne Co.*, 451 U.S. at 567. In comparing those cases with the evidence presented by the plaintiff in *J. Truett Payne* the court noted that the testimony of the petitioner's owner and an expert witness were not supported by documentary evidence as to the effect of the discrimination on retail prices. *Id.* at 564. The owner of the car dealership testified that the discrimination caused him to "overallow" on trade-ins, thus reducing his profits on his used car operation. The expert testified that the discrimination would ultimately cause retail prices to be held at an artificially high level and that petitioner made less money per car than its competitors. *Id.* This evidence was determined by the court to be weak even if construed favorably to the petitioner. *Id.* at 565.

On remand, the Court of Appeals, in examining the evidence on damages, which included an estimate of goodwill and projections of profit based on past earnings, found that it contained "self-serving and unsupported assumptions" and that the plaintiff "relied on nothing more than the mere fact of alleged price difference and the hypothesized effect of the difference on its business." *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 582 (5th Cir. 1982). The court ordered the district court to enter a judgment for the defendant based on plaintiff's lack of proof of damages.

The plaintiff in the case *sub judice* has presented even less evidence to support an award for damages. The plaintiff's expert did not even analyze the damages issue in regard to the Robinson-Patman claim based on foreclosure from the cash register core market. Mr. Harp's testimony that he lost a 10% profit on the entire volume of sales by Sonoco to NCR is certainly without support.

Double H, in addition to requesting treble damages, has asked for injunctive relief. At this point, of course, we need to deal with such relief only with respect to the Robinson-Patman Act violation. The question that arises is whether this court can impose a permanent injunction once it has found that the

Robinson-Patman Act has been violated but the plaintiff has failed to prove actual injury to itself.

Injunctive relief is an equitable remedy provided for under § 16 of the Clayton Act, 15 U.S.C. § 26. The remedy invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened injury" [and is] characteristically available even though the plaintiff has not yet suffered actual injury." *Zenith Corporation*, 395 U.S. at 130 (citation omitted). To obtain relief under § 16, the plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.*

In the *Zenith* case itself the Supreme Court did find that injunctive relief was proper only after finding that treble damages were properly awarded by the District Court.

While the language in *Zenith Corporation* is somewhat equivocal, it would appear that a significant threat of injury or the fact of injury is still required for relief. Because Double H has been unable to demonstrate injury or threat of injury to itself, injunctive relief shall be denied.

VI. CONCLUSIONS

Because plaintiff has failed to present sufficient evidence to support an award, even uner the relaxed damages rules of antitrust law, *see J. Truett*, 451 U.S. at 567, this court shall enter judgment in favor of the defendant and against the plaintiff on the Robinson-Patman claim. The state law claim also must fail for lack of proof of damages. Finally, we shall enter judgment for the defendant and against the plaintiff on the Sherman Act claim due to plaintiff's failure to present sufficient evidence to persuade this court that the defendant had the requisite specific intent.

The above constitutes this court's findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

Order of United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 82-1904

January 21, 1983

DOUBLE H PLASTICS, INC.,

vs.

SONOCO PRODUCTS COMPANY.

ORDER

1. Judgment is entered in favor of the defendant and against the plaintiff on the Sherman Act § 2(a) claim.

2. Judgment is entered in favor of the defendant and against the plaintiff on the Robinson-Patman Act claim.

3. Judgment is entered in favor of the defendant and against the plaintiff on the state law claim of intentional interference with plaintiff's prospective business relations.

4. Plaintiff's request for an injunction is DENIED.

IT IS SO ORDERED.

/s/ CHARLES R. WEINER
Charles R. Weiner

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1111

(D.C. Civil No. 82-1904)

DOUBLE H PLASTICS, INC.,

Appellant,

vs.

SONOCO PRODUCTS COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present:

SEITZ, *Chief Judge*,
GIBBONS and ROSENN, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was resubmitted before original panel pursuant to Third Circuit Rule 12(6) on February 3, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered January 24, 1983, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ SALLY MRVOS
Clerk

April 20, 1984

Certified as a true copy and issued in
lieu of a formal mandate on May 29, 1984.

Teste:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, U.S. Court of
Appeals for the Third Circuit

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1111

(Civil No. 82-1904 — E. D. of Penna.)

DOUBLE H PLASTICS, INC.,

Appellant,

v.

SONOCO PRODUCTS COMPANY,

Appellee.

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*,
ALDISERT, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*,
and ROSENN, *Senior Circuit Judge*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available

* Judge Gibbons would grant panel rehearing.

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

DATED: May 21, 1984

Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DOUBLE H PLASTICS, INC.,

Petitioner,

v.

SONOCO PRODUCTS COMPANY,

Respondent.

BRIEF OF RESPONDENT SONOCO PRODUCTS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the court of appeals properly exercised its authority under Rule 52(a) of the Federal Rules of Civil Procedure to correct contradictory findings by a district court.

II. Whether the court of appeals (a) properly applied its established legal standard governing express evidence of predatory intent in primary line cases under Section 2(a) of the Robinson-Patman Act, and (b) whether that standard is appropriate.

III. Whether the petitioner's burden-of-proof argument (a) is relevant to the decision of this case, and (b) was properly raised in the courts below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-263

DOUBLE H PLASTICS, INC.,

Petitioner,

v.

SONOCO PRODUCTS COMPANY,

Respondent.

BRIEF OF RESPONDENT SONOCO PRODUCTS COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The statement of petitioner Double H Plastics, Inc. ("Double H") is incomplete in that it fails to state that the United States District Court for the Eastern District of Pennsylvania found that respondent Sonoco Products Company ("Sonoco") had not violated Section 2 of the Sherman Act through predatory pricing, and entered judgment for Sonoco with respect to both the Sherman Act and Robinson-Patman Act claims. 575 F. Supp. 389 (E.D. Pa. 1983). Double H did not appeal the adverse judgment on its Sherman Act claim.[1]

[1] In compliance with Rule 28.1, Sonoco states that it has no parent corporation and no publicly-held subsidiaries or affiliates. Two foreign affiliates of Sonoco are jointly owned with a publicly-held corporation, one with Domtar, Inc. (Canada) and the other with Australian Consolidated Industries (Australia).

COUNTERSTATEMENT OF THE CASE

I. Statement of Relevant Facts.

Business machine cores are spools that hold rolls of paper for adding machines and cash registers. The cores are made in two types, the smaller type fitting adding machines and the larger fitting cash registers. Business machine cores are made either of plastic or of fiber (*i.e.*, paper or cardboard). Most adding machine cores are made of plastic, while most cash register cores are made of fiber.

Petitioner Double H is the dominant manufacturer of plastic business machine cores. In the relevant period of 1979-1982, Double H's share of plastic business machine core sales ranged between 64% and 71%. Respondent Sonoco was historically a manufacturer of fiber cores. In the 1970's, plastic cores (made by Double H and other companies) displaced fiber as the principal material for adding machine cores, and Sonoco lost almost all of its adding machine core business. In an effort to regain its lost business, Sonoco began making its own plastic cores in early 1980.

Sonoco's new plastic cores had little effect on Double H's dominant position. In 1981, Double H sold $2.1 million in business machine cores (all plastic), while Sonoco's combined sales volume in the product was only $1.2 million ($461,000 in plastic cores and $721,000 in fiber cores).

NCR Corporation ("NCR"), the largest cash register core customer, bought fiber cores from Sonoco and from Sonoco's chief competitor in fiber cores, Crescent Paper Tube Co. ("Crescent"). Sonoco was forced to offer discounts to NCR in order to compete with Crescent's prices. For example, in 1981 Crescent sold fiber cash register cores to NCR for $9.15 per thousand. To compete

with Crescent, Sonoco offered the same core to NCR at $9.59 per thousand, compared to its $11.53 list price. Despite Crescent's lower prices, NCR bought about 25-30% of its needs from Crescent and about 70-75% from Sonoco.

In 1980, Double H began to quote prices on plastic cash register cores to NCR. Double H's prices ($8.12 per thousand) were much lower than either Crescent's prices or Sonoco's discounted prices. In other words, *Double H's own prices were more than 15% below the discounted Sonoco prices that Double H contends were illegally discriminatory.*

Although NCR's purchasing agent professed that "economics" were the major factor in NCR's choice of cores, NCR's conduct belied his words. Despite the availability of plastic cash register cores at much lower prices, NCR continued to buy fiber cash register cores exclusively, obtaining them from Crescent and Sonoco. In fact, when asked whether NCR would switch to plastic cores if the "economics" so dictated, the NCR purchasing agent responded: "NCR, as a company, I would have to say no." He testified that a switch could not be made without consulting both the manufacturing and marketing departments.

Even though Double H offered NCR the lowest prices by far of any competitor, and even though Double H is the dominant manufacturer of business machine cores, Double H maintains that Sonoco has injured competition by selling to NCR at prices that were substantially higher than either Crescent's or Double H's own. Double H claims that Sonoco's prices have "frozen" NCR in fiber cores even though NCR's actions have proven to be relatively indifferent to price, and even though—if Sonoco *did* raise its prices—NCR could continue to buy fiber

cores from Crescent at Crescent's pre-existing, lower prices.

II. Procedural History.

Double H filed an action against Sonoco in the United States District Court for the Eastern District of Pennsylvania, alleging that Sonoco had attempted, in violation of Section 2 of the Sherman Act, to monopolize the market for business machine cores, encompassing both fiber and plastic cash register and adding machine cores. Central to Double H's attempted monopolization claim was its allegation that Sonoco had engaged in predatory (below-cost) pricing.

Shortly before trial, Double H amended its Complaint to allege that Sonoco's fiber core sales to NCR violated Section 2(a) of the Robinson-Patman Act. The amended Complaint also added the specific allegation that Sonoco's fiber core sales to NCR were below-cost and predatory.

The district court found that Sonoco had not violated Section 2 of the Sherman Act. The court found that Double H failed to prove that Sonoco had engaged in predatory pricing. D.Ct. Op. 56a.[2] The district court also found that Sonoco's fiber core sales to NCR were profitable. D.Ct. Op. 57a. Sonoco had raised its fiber core prices, overcoming NCR's resistance, and the court found that Sonoco had not "intentionally sold below cost to keep NCR from switching to plastic so long as Double H is in the picture." *Id.*

Moreover, the court found that other evidence proved that Sonoco had not acted with predatory intent, because its plastic core pricing was the result of "stiff competition"

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[2] "Pet." refers to Double H's petition. "____ a" refers to the Appendix to Double H's petition.

and reflected nothing except "normal business goals." D.Ct. Op. 56a. The district court found that Double H had suffered merely "discomfort with competition" because "[r]ather than passively receiving orders and neglecting to 'make house calls,' it was forced to venture into its market and exhibit its wares." *Id.*

Turning to the Robinson-Patman Act claim, the district court found—in direct contradiction to its above-quoted findings—that Sonoco's fiber core prices reflected predatory intent because a single Sonoco memorandum stated that NCR would buy fiber cores "until the economics favor switching to plastics" and that other fiber core buyers were "reluctant" to switch until NCR did. D.Ct. Op. 59a. Double H adduced no other claimed evidence of an adverse effect on competition. The district court found that Double H had not attempted to establish anticompetitive effect by market analysis, and that its claim of below-cost pricing was unproven.

The district court did not accept Sonoco's defense that its prices to NCR simply met Crescent's competition (although the court also found that "had Sonoco offered its paper cores to NCR at the same price it offered them to its other customers, NCR would have bought from Crescent." D.Ct. Op. 63a). The court dismissed Double H's Robinson-Patman Act claim because Double H had failed to prove either the fact or the amount of antitrust injury. *Id.* at 62-65a.

Double H appealed the dismissal of its Robinson-Patman Act claim, but it did *not* appeal the dismissal of its Sherman Act claim, including the district court's findings that Sonoco's fiber and plastic core prices were not below cost, and its findings that Sonoco had not acted with predatory intent in the pricing of either type of core.

The Third Circuit affirmed the district court's dismissal of the Robinson-Patman Act claim, but on different grounds.[3] It held that the district court erred in finding a violation of the Robinson-Patman Act. The court noted the absence of evidence of anticompetitive effect through either market analysis or below-cost pricing. 3d Cir. Op. 25-26a. The court held that it was clear error for the district court to infer predatory intent and anticompetitive effect from the single Sonoco memorandum, because the lower court's finding of predatory intent was contradicted by its Sherman Act findings that no such predatory intent existed, and also because that memorandum "simply reveals that the defendant was aware of the realities of its own marketplace." *Id.* at 28a. The court noted that Double H's quoted prices to NCR for plastic cores were considerably lower than Sonoco's fiber core prices, but "[f]or reasons that remain unclear NCR has continued to buy paper cores from the defendant." 3d Cir. Op. 23a. The court also observed that Double H "remains a successful company," with 65-70% of all plastic business machine core sales. *Id.* at 24a.

In addition, the Third Circuit held that the Sonoco memorandum did not satisfy the legal test for express evidence of predatory intent set out in *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). The Third Circuit did not reach the questions of whether Sonoco's prices were lawful as good-faith meeting of Crescent's competition, or whether Double H had suffered antitrust injury. Judge Gibbons dissented.

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[3] In an initial opinion, vacated on Sonoco's motion for rehearing, the Third Circuit (Chief Judge Seitz dissenting) reversed the district court's finding of absence of injury to Double H as clearly erroneous.

We shall demonstrate that Double H's petition for a writ of certiorari should be denied. The Third Circuit correctly discharged its function under Fed. R. Civ. P. 52(a) by setting aside as clearly erroneous district court findings that were irreconcilably in conflict with its other unappealed and conclusive findings. An appeals court's rectification of particular factual conflicts in a lower court's opinion does not warrant review by this Court. Equally important, the court correctly concluded that Double H's evidence failed, as a matter of law, to satisfy the standard for predatory intent in the Third Circuit. The application of an established legal standard to the particular facts of record does not merit review by this Court.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' PROPER APPLICATION OF RULE 52(A) TO CORRECT CONTRADICTORY TRIAL COURT FINDINGS DOES NOT WARRANT REVIEW BY THIS COURT.

The Third Circuit applied the clear error standard of Rule 52(a) to correct a district court decision that was internally contradictory. The district court dismissed Double H's Sherman Act claims because it found that Sonoco had pursued normal, nonpredatory business goals. Yet, on the same set of facts, the district court found a violation of the Robinson-Patman Act based on Sonoco's supposedly predatory intent. The Third Circuit discharged its responsibility under Rule 52(a) as a reviewing court by accepting the district court's unchallenged Sherman Act findings, and by setting aside as clearly erroneous the district court's contradictory Robinson-Patman Act findings.

The Third Circuit did not engage in "appellate factfinding" on a question of intent (Pet. 16-17), for the district

court had found *two* sets of mutually exclusive facts, and they *both* related to Sonoco's intent. The Third Circuit respected the district court's factfinding role by accepting its unappealed Sherman Act holding that no predatory intent existed. When the two halves of a trial court opinion reach opposite results, on an intent question or any other, Rule 52(a) does not require the reviewing court to perform the impossible feat of deferring to both. Here, the reviewing court's choice was inevitable, for one set of findings—that there was no predatory intent—was unchallenged.[4]

In deciding Double H's Sherman Act claim, the district court found that Sonoco's intent was procompetitive and nonpredatory both generally with regard to all its business machine core sales, and specifically with regard to *the very same sales to NCR on which Double H's Robinson-Patman Act claims were based.* The district court found that Sonoco's desire that NCR switch to Sonoco plastic cores represented a "normal, in fact, expected business goal," and that Sonoco had increased its fiber core prices to NCR despite NCR's resistance. D.Ct. Op. 57a.[5] Sonoco's "documented efforts to raise its price

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[4] In *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963), confronted with inconsistent trial court findings as to the parties' intent, this Court—like the Third Circuit here—accepted one set of findings as correct and treated the other as clearly erroneous. Rule 52(a) does not immunize intent findings from appellate review. In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534 n.8 (1979), the Court sustained the court of appeals' reversal of a trial court's intent findings, describing the appellate court's "unavoidable duty" to "determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are."

[5] Sonoco had announced three price increases in the space of 15 months, and succeeded in implementing two of them.

to NCR for its fiber cores belies the conclusion that it has intentionally sold below cost to keep NCR from switching to plastic so long as Double H is in the picture." *Id.* Double H did not appeal these findings, and they therefore became conclusive and not open to review.

The district court also rejected Double H's claims that Sonoco had engaged in predatory pricing of its plastic business machine cores, finding that Sonoco's sales were not below cost, and reflected no more than "stiff competition" and the intent "to increase sales volume," a "normal business goal[]." D.Ct. Op. 56a. Sonoco expected Double H to retain a 60% market share in plastic cores for the foreseeable future, and "[t]he intent that can readily be inferred from this . . . calculation is that of competition with Double H rather than its elimination." D.Ct. Op. 57a.

But when the district court considered Double H's Robinson-Patman Act claim, the court took no account of its Sherman Act findings. Instead, the district court found that Sonoco's fiber core sales to NCR were animated by predatory intent because a Sonoco memorandum said that other cash register core customers would not buy plastic cores unless NCR did so first, and that NCR would buy fiber cores "until the economics favor switching to plastics." D.Ct. Op. 59a.

The district court's contradictory Sherman Act and Robinson-Patman Act findings could not both be correct, and the Third Circuit properly credited the district court's findings of procompetitive intent and "normal business goal[s]" in "the unchallenged portion of its opinion addressing the Sherman Act claim." 3d Cir. Op. 28a. Moreover, the Third Circuit detected no evidence of an intent to injure Double H in the single memorandum on which the court below had relied for its Robinson-Patman

Act finding, but only a nonpredatory "aware[ness] of the realities of its own marketplace." *Id.* The Third Circuit therefore set aside the finding of predatory intent as clearly erroneous, and held that Sonoco had not violated the Robinson-Patman Act.

Moreover, as a matter of law, as well as on the particular facts of this case, predatory intent cannot have one meaning under Section 2 of the Sherman Act and a different meaning under Section 2(a) of the Robinson-Patman Act on the same set of facts. "Where . . . a price differential threatens a primary line injury, . . . [Section 2 of the Sherman Act and Section 2(a) of the Robinson-Patman Act] are directed at the same economic evil and have the same substantive content." *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).[6]

Rule 52(a) invests a reviewing court with the power to set aside contradictory trial court findings as clearly erroneous. This Court has itself exercised that power. *United States* v. *General Motors Corp.*, 384 U.S. 127, 142 (1966) ("[W]e regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory 'finding' that there had been no 'agreement' among the defendants

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[6] *Accord, D.E. Rogers Associates, Inc.* v. *Gardner-Denver Co.*, 718 F.2d 1431, 1438-40 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 3513 (1984); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1041-42 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). The Federal Trade Commission held in *International Telephone & Telegraph Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188 at 23,095 (July 25, 1984) that "[w]hen predatory intent or predatory pricing are relied upon to establish primary line injury to competition in violation of Section 2(a), the standards that govern the intent and conduct components of the attempted monopolization offense should apply." (footnote omitted)

and their alleged co-conspirators."); *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963).

The Third Circuit simply performed the function that Rule 52(a) prescribes. There is no reason for this Court to review, on the particular evidence in this record, whether the conflict in the district court's opinion might have been resolved differently.[7] "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Double H makes much of the fact that the author of the document on which the district court based its Robinson-Patman Act finding testified at trial. Pet. 17-18. But the same witness (the general manager of Sonoco's plastics division) testified on the Sherman Act claims, and the district court relied on his testimony in deciding those claims in Sonoco's favor. D.Ct. Op. 55a. The district court heard testimony and observed demeanor in both the Sherman Act and Robinson-Patman Act halves of the case; its opportunity to do so does not give one part of its opinion greater weight than the other.[8]

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[7] This case's lack of significance beyond the immediate parties to the dispute is underlined by the failure of any Third Circuit judge in active service to vote in favor of Double H's petition for rehearing in banc. Judge Gibbons, the dissenting judge below, voted solely for panel rehearing, and did not vote for rehearing in banc. 69-70a.

[8] Because the district court's Robinson-Patman Act finding of predatory intent rested primarily on a document, the Third Circuit could examine that finding more searchingly than one based on oral evidence. "The same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony . . . but the presumption has lesser force in the former situation than in the latter." *Bose Corp.* v. *Consumers Union*, 104 S. Ct. 1949, 1959 (1984). *See also United States* v. *General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966).

Double H maintains that the district court's finding of predatory intent could not have been clearly erroneous because Judge Gibbons said that the evidence "certainly tend[s] to support that conclusion." 3d Cir. Op. 34a (dissent). But the asserted existence of contrary evidence does not foreclose a finding of clear error. "A finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). Indeed, Judge Gibbons himself described the evidence as "perhaps not compelling a conclusion that Sonoco granted NCR price discrimination for [a] predatory purpose." 3d Cir. Op. 34a (dissent).

Finally, Double H urges that Judge Rosenn could not have harbored "the '*definite and firm*' conviction that a mistake has been made" because after initially concurring with Judge Gibbons, he voted for panel rehearing and then joined Chief Judge Seitz in setting aside the district court's finding. Pet. 18 (emphasis in original). But Rule 52(a) does not forbid a court to grant a motion for rehearing; a judge can arrive at a "definite and firm conviction" on reconsideration as well as in the first instance. The fact that this case was decided on rehearing shows only that the Third Circuit approached its review of this record with careful attention.

In short, this case presents nothing more than the familiar application of Rule 52(a) to resolve an inherent conflict in a district court opinion. Appellate courts perform this task regularly, and the Third Circuit in doing so neither abused its function nor created an issue that requires review by this Court.

II. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The district court's findings on the Robinson-Patman count were contrary to the Third Circuit's predatory intent standard. In fact, the district court did not even acknowledge the existence of the proper legal standard. The court of appeals rectified this error. Its decision analyzes the facts within the framework of the Third Circuit's standard, a standard that is entirely consistent with this Court's decisions. There is therefore no reason for this Court to review this case.

A. Unlike The District Court, The Court Of Appeals Correctly Followed The Third Circuit's Legal Standard On Predatory Intent.

In the Third Circuit, in primary line cases, "[t]here are two basic means of meeting the competitive injury requirement: (1) actual competitive injury shown by market analysis; and (2) predatory intent from which competitive injury may be inferred." *O. Hommel Co.* v. *Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). Predatory intent may be shown by "(a) express evidence; and (b) by inference from 'below-cost' pricing." *Id.*

The court of appeals agreed with the district court that Double H failed to offer any market analysis and instead relied on evidence of predatory intent. 3d Cir. Op. 25a.[9]

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[9] Double H claims to have proven competitive injury by "market analysis" because cash register core customers assertedly would not switch from fiber to plastic unless NCR did so first. Pet. 12-13. But both the district court (59a) and the Third Circuit (25a) found no proof by market analysis. Whether or not NCR was the industry leader, Sonoco's prices did *not* "freeze" NCR as a user of fiber cores. Sonoco's fiber core competitor, Crescent, sold fiber cores to NCR at prices

The court of appeals considered both the "below-cost pricing" and the "express evidence" elements of the predatory intent test. It further agreed with the district court's unchallenged finding that Sonoco "did not sell paper cores to NCR at prices below cost." *Id.* at 26a. It concluded that "[t]he plaintiff's case therefore turns on express evidence of predatory intent." *Id.*

The Third Circuit then determined that the district court erred in finding express evidence of predatory intent. Not only were the district court's findings internally contradictory (see Section I herein), but also the district court completely ignored the applicable legal standard. In *O. Hommel*, the Third Circuit, after reviewing the legislative history of the Clayton Act, determined that "predatory intent is an intent to destroy a rival with the ultimate purpose of acquiring a monopoly in a particular locality." 659 F.2d at 347. It therefore held that "[t]o be relevant, express evidence of predatory intent should demonstrate the alleged predator's intention of sacrificing present revenues with the hope of obtaining monopoly profits." *Id.* at 348.[10]

Without even referring to this standard, much less applying it to the evidence, the district court found that

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lower than Sonoco's. If Sonoco were to raise its prices (or, for that matter, discontinue production), NCR could continue to use fiber cores, buying them from Crescent at Crescent's prevailing prices. The district court found that "had Sonoco offered its paper cores to NCR at the same price it offered them to its other customers, NCR would have bought from Crescent." D.Ct. Op. 63a.

[10] Double H, relying on Judge Gibbons' dissent, asserts that the Third Circuit has "establish[ed] an impossible evidentiary standard." Pet. 10. But Judge Gibbons premised his dissent on the patently incorrect view that *O. Hommel* applies only to cases of below-cost pricing, and not to cases involving "direct evidence" of predatory

Sonoco acted with predatory intent. In contrast, the court of appeals, applying the *O. Hommel* test, concluded that "[t]here is no evidence to support a factual inference that the defendant is sacrificing present revenues for the purpose of injuring the plaintiff." 3d Cir. Op. 28a. In particular, upon reviewing the memorandum on which the district court most heavily relied, the court of appeals said:

> The internal memorandum on which the district court relied states simply that (1) NCR is the defendant's major paper core customer, (2) "economics" will determine whether NCR stays with paper cores or switches to plastic, and (3) other members of the market will not switch until NCR does so. There is nothing in this document that suggests that the defendant's primary purpose in offering the discount to NCR was to injure the plaintiff. Instead, the document simply reveals that the defendant was aware of the realities of its own marketplace, and evidence of such awareness, standing alone, cannot support an inference of predatory intent.

Id. at 27a-28a. In short, the flaws in the district court's opinion—its internally contradictory findings and its failure to apply the correct legal standard for evaluating purportedly express evidence of predatory intent—have been fully corrected by the Third Circuit's decision.

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intent. 3d Cir. Op. 34a n.3 (dissent). To the contrary, *O. Hommel* (as noted above) specifically sets out the legal standard for "express evidence" of predatory intent. 659 F.2d at 348. In other words, this case did not "establish" a standard for express evidence of predatory intent, let alone an "impossible" one. Judge Gibbons failed to perceive that this case simply applied the accepted standard of *O. Hommel*.

B. The *O. Hommel* Competitive Injury Standard Is Consistent With Decisions Of This Court.

Double H claims that the *O. Hommel* competitive injury standard conflicts with two cases in this Court holding that competitive injury is established prima facie by proof of a substantial price discrimination between competing purchasers over time. Pet. 10. Double H sees conflict where none exists.

The holdings in the two cases on which Double H relies are inapplicable because those cases dealt with a much different type of competitive injury than is involved here. In *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), the issue was whether competitive injury occurred among favored and disfavored *buyers* ("secondary-line" competition). In *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the price discrimination resulted in competitive injury among buyers (secondary-line competition) through competitive injury to buyers' customers ("tertiary-line" competition). Neither of these cases involved primary-line competitive injury (*i.e.*, injury at the level of competition between the discounting *seller and its competitors*).

In contrast, the claimed competitive injury in this case is solely on the primary-line level. Double H's theory at trial was that Sonoco's discounts to NCR injured competition between Sonoco and its competitor, Double H. And there is not one finding by the district court of injury to secondary-line competition.

There is a fundamental distinction between Section 2(a) cases involving claims of primary-line competitive injury and those involving alleged secondary-line injury. While secondary-line competitive injury is established prima facie by proof of a substantial price discrimination between competing purchasers over time, *Morton Salt*, 334

U.S. at 50-51, no decision of this Court has held or even intimated that this standard also applies to primary-line cases. On the contrary, in *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), a primary-line case, this Court indicated that a more rigorous standard applies to primary-line cases. The Court specifically noted that predatory intent might be relevant to the issue of competitive injury, and it said

> Of course we do not depart from our holding in Federal Trade Comm. v. Morton Salt . . . as to adequacy of proof of tendency to injure competition in cases involving discrimination between purchasers. The instant case, as we have pointed out, involves differences in prices among competing sellers.

363 U.S. at 552 n.21. Indeed, the *Anheuser-Busch* Court treated as irrelevant the competitive impact, or absence thereof, of price discrimination on competing purchasers.

> The existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned.

363 U.S. at 546.

In the years since *Anheuser-Busch* was decided, commentators and the Federal Trade Commission have recognized that the standard for proving competitive injury in secondary-line cases is not applicable to primary-line cases.[11] The FTC, in its most recent Robinson-Patman

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[11] A leading treatise on the Robinson-Patman Act, F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 124 (1962), observes that

> Although a doctrinal consistency may be professed, price variations challenged for their impact at the *seller's* level are con-

Act case, held that "[t]he injury to competition standards in primary line and secondary line cases differ." *International Telephone & Telegraph Corp.*, 3 Trade Reg. Rep. (CCH) ¶ 22,188 at 23,094 (July 25, 1984). Moreover, the FTC cited *this very case—Double H Plastics, Inc.* v. *Sonoco Products Company* (as well as *O. Hommel*)—as embodying the proper legal standard for competitive injury in primary-line cases. *Id.* at 23,095 n.103. The courts defer to the FTC's expertise in interpreting the Robinson-Patman Act (*FTC* v. *Morton Salt Co.*, 334 U.S. at 54), and the FTC's acceptance of the legal standard applied by the Third Circuit in this case lends powerful support to its correctness.

Double H ignores the distinction drawn by this Court in *Anheuser-Busch* and claims that the secondary-line standard is applicable to primary-line cases because in *Falls City* the Court said (citing *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 522 (1963)) that the Robinson-Patman Act "is of general applicability and prohibits discriminations generally." Pet. 11. This statement in *Falls City* has no relevance to this case. The Court said *nothing* about extending the *Morton Salt* standard to primary-line cases. The *Sun Oil* case involved only secondary-line competition. Indeed, in *Sun Oil* the Court said: "Nothing we say in this case—involving injury only to so-called 'secondary-line competition,' that is, competition among buyers—is in-

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demned only after a more forceful demonstration of inimical competitive impact than might satisfy a charge of injurious effect on the customer level. The distinction appeared in the Supreme Court's *Anheuser-Busch* decision of 1960, where the Court noted that the broad *Morton Salt* principle which sanctioned some inferences of competitive "injury" from the mere existence of substantial price variations pertained to "discrimination between purchasers," while a more far-ranging inquiry seemed appropriate to assess "differences in prices among competing sellers." [citing 363 U.S. at 552 n.21]

consistent with Federal Trade Comm. v. Anheuser-Busch, Inc. . . ." 371 U.S. at 527 n.16. In short, Double H has identified no decision of this Court which conflicts with the holding in *O. Hommel* that, in primary-line cases, competitive injury must be established either by market analysis or by proof of predatory intent.

III. PETITIONER'S BURDEN-OF-PROOF ARGUMENT SHOULD NOT BE REVIEWED BY THIS COURT BECAUSE IT IS IRRELEVANT AND WAS NOT RAISED BELOW.

For the first time in this lawsuit, Double H contends that in a Section 2(a) primary-line case, proof of price discrimination satisfies a plaintiff's *initial* burden of showing injury to competition and shifts to the defendant the burden of proving that its acts did not substantially lessen competition. This argument is obviously an afterthought. Double H tried the case not on this theory, but rather on the established theory that competitive injury could be established only upon *Double H's proof* of predatory intent or *Double H's proof* of actual competitive injury. Double H never suggested that the burden of proof should shift to Sonoco upon proof that Sonoco sold cores to NCR at a discount. In other words, Double H has taken the anomalous position of asking this Court to reject the legal theory upon which it relied in the district court and in the court of appeals.

Double H's belated burden-of-proof argument is irrelevant because this case was not decided on the basis of whether Double H had carried its "*initial* burden of showing injury to competition." *John B. Hull, Inc.* v. *Waterbury Petroleum Products, Inc.*, 588 F.2d 24, 28 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (emphasis added). This case was decided after a full trial on the merits, in which Sonoco rebutted whatever inference of

injury to competition arguably flowed from the mere fact of price discrimination. Sonoco proved that its sales to NCR were profitable (*i.e.*, above cost) (D.Ct. Op. 57a), that Double H grew and prospered as the dominant seller of business machine cores (3d Cir. Op. 23-24a), that Double H's prices were 15% lower than Sonoco's (*id.* at 24a), that Crescent was ready and able to supply NCR with fiber cores even if Sonoco eliminated its discount (D.Ct. Op. 63a), and that Sonoco's motives were "within the bounds of sound and legal business judgment." (3d Cir. Op. 28a). Assuming *arguendo* that the burden of proof shifted to Sonoco, Sonoco carried that burden. The asserted conflict between the circuits to which Double H points is thus academic, and would require this Court to render an advisory opinion if Double H's petition were granted. Under the asserted Second Circuit rule, the same result is mandated: judgment for Sonoco.

Double H's burden-of-proof argument is unsuitable for review for the additional reason that only in exceptional circumstances does this Court review questions not raised by the petitioner in the district court or in the court of appeals. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Rogers* v. *Herman Lodge*, 458 U.S. 613, 628 n. 10 (1982). Double H's burden-of-proof question presents no such exceptional circumstances. It is simply a last-ditch effort by Double H to resuscitate a case that was correctly decided against it.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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